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NEW YORK CITY'S DEBT

FACTS AND LAW
RELATING TO THE CONSTITUTIONAL LIMITATION
OF NEW YORK'S INDEBTEDNESS

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A Brief
Of the Evidence Taken
By
Hon. Benjamin F. Tracy, Referee
In
Levy *vs.* The Board of Estimate and Apportionment

Submitted by
BUREAU OF MUNICIPAL RESEARCH
261 Broadway, New York
February, 1909

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Feb 18, 1929

FOREWORD

For the past year no municipal question has so persistently engaged the attention of the New York public as the city debt. During this period the available borrowing margin, commonly spoken of as the debt limit, has proved a veritable will-o'-the-wisp. The normal uncertainty of the public mind has been increased by a succession of official and quasi-official pronouncements on the municipality's capacity to incur further indebtedness. Scarcely has one of these statements been digested and accepted by the public as a final word on the subject before another has appeared, with the result that not even public officials have been able to retain a conviction as to the city's present ability to raise funds with which to build new subways. Confusion respecting the amount of city indebtedness has been especially emphasized during this period by reason of the fact that the debt has so nearly approached the constitutional limitation of borrowing power that the city has found itself unable to prosecute, with its accustomed lavishness, various public improvements for which demand has been made.

Public interest in this question is not retrospective, but looks forward to finding the means wherewith to build subways and to meet other municipal needs. It will not be possible to avoid in the future the confusion which has existed during the past year, unless careful inquiry is made into the nature of the present indebtedness of the city, and rules laid down for the future guidance of public officials in determining the available borrowing capacity as of any given date. For this reason especial importance attaches to the litigation to which the following brief is related.

In June, 1908, on the initiative of the comptroller, a taxpayer enjoined the board of estimate and apportionment from approving a contract for the construction of a rapid transit railroad, on the ground that the city's constitutional capacity to incur further indebtedness was insufficient to provide funds necessary for its construction. Ostensibly to determine whether the injunction thus secured should be made permanent, the court

ordered an inquiry to be made into the amount of existing indebtedness of the city within the meaning of the constitutional limitation as of June 30, 1908. For the purpose of determining this indebtedness, a referee was appointed, by whom voluminous testimony has been received on the several questions at issue.

The Bureau of Municipal Research for some time prior to the initiation of the proceedings before the referee had been engaged upon an analysis of the elements of the bonded and contractual indebtedness of the city. Recognizing in these highly important proceedings a most valuable opportunity for bringing to final determination many uncertain points respecting the classification and interpretation of this indebtedness, the Bureau placed the information in its possession at the disposal of the referee and the parties to the litigation.

During the course of the reference, which lasted through several months, representatives of the Bureau were in constant attendance at the hearings, and frequent conferences were had with counsel. At the conclusion of the taking of testimony, although not a party to the suit, the Bureau prepared and submitted a brief of the evidence, in order to place before the referee in the most convenient form the results of its analysis of the questions under consideration.

The evidence received by the referee related solely to the question,—what shall and what shall not be construed as indebtedness within the meaning of the constitutional provision which limits the *debt incurring power of a municipality to ten per cent of the assessed valuation* of its taxable real property? Not only was it necessary to search for an answer to the question at issue, but the question itself had first to be interpreted. What the constitution meant was uncertain with respect to almost every term it employed, save the word "municipality" itself. What is debt? When is debt incurred? Which assessment of value shall be taken? What is taxable real property? Merely to define the meaning of these terms involved protracted inquiry.

When the courts have clearly established the classes of indebtedness which are to be included in calculating the city's capacity to borrow under the constitutional limitation (whether or not they are to be restricted to actual bonds outstanding, not taking into consideration liabilities incurred which will in course have to be funded by the issue of bonds, as was recently suggested by a legislative committee), and when they have determined what deduction is to be made from this indebtedness in estimating the borrowing margin, there still will remain, with respect to the city debt, problems of far-reaching consequence to which the recent reference was not addressed. These problems relate to methods to be employed in spending funds raised hereafter by pledging the credit of the future. If confusion has prevailed with respect to the manner of classifying past indebtedness, greater confusion has existed with respect to the manner in which such indebtedness was incurred. Typical of this condition was the financial situation of June 30, 1908, when, with a borrowing capacity estimated by the comptroller at less than $3,000,000, there were outstanding authorizations for the issue of additional stock exceeding $180,000,000 in amount. The improvements that these authorizations represented were not planned with reference to the city's ability to finance them, were not weighed in the light of other municipal needs, but were approved from time to time separately, and often without consideration either of those needs or the city's financial ability. With an accurate basis provided for estimating its capacity to borrow, an important step will have been taken to secure a wise development of the municipality, but this wise development cannot follow unless another step is taken, namely, the provision of a precise method of planning improvements with sufficient judgment and foresight, not only that indebtedness may not be incurred in excess of the constitutional limitation, but that unnecessary and less necessary undertakings may be postponed until the necessary are accomplished.

JEFFERSON M. LEVY
Plaintiff

against

GEORGE B. McCLELLAN, *et al.*, as Members of the Board of Estimate and Apportionment of the City of New York
Defendants

Referred to
HON. BENJAMIN F. TRACY
Referee

Brief submitted by the Bureau of Municipal Research

The plaintiff in the above entitled case asks the court to restrain the defendants, members of the Board of Estimate and Apportionment of the City of New York, from certifying or approving certain contracts for the construction of a rapid transit railway, involving a total estimated expenditure of $15,886,381.20. Injunction Asked for

From the plaintiff's affidavits, it appears that he bases his right to the injunction asked for upon the contention that the City of New York had reached the limit of its power to incur indebtedness, and was, at the time the said affidavits were filed, without power or authority to incur the obligation of the said contracts. Plaintiff's Contention

Whether this contention is well founded, **depends upon the interpretation of the limitation of municipal indebtedness contained in Article VIII, Section 10 of the State Constitution** and its application to the taxable property and the existing indebtedness of the City of New York. The Constitution provides: Question Involved

Article VIII, Section 10:

"No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law.[1] Loan of Public Credit Prohibited

[1]Amendment of 1874

Constitutional Limitation on Amount of Municipal Indebtedness

"No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten percentum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness; and all indebtedness in excess of such limitation, except such as now may exist, shall be absolutely void, except as herein otherwise provided. No county or city whose present indebtedness exceeds ten percentum of the assessed valuation of its real estate subject to taxation, shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained, or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water, but the term of the bonds issued to provide for the supply of water shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity.[1]

Revenue Bonds May Be Issued

Also Certain Water Bonds

"All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted,[2] except that debts incurred by the city of New York after the first day of January, nineteen hundred and four,[3] and debts incurred by any city of the second class after the first day of January, nineteen hundred and eight,[4] to provide for the supply of water shall not be so included.

Computation of Revenue and Water Bonds as Debts

Water Debt of New York City Exempted

[1]Amendment of 1884 as amended in 1894
[2]Amendment of 1894
[3]Amendment of 1905
[4]Amendment of 1907

"Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease, but the debt of the county, heretofore existing, shall not, for the purpose of this section, be reckoned as a part of the city debt.[1]

County Bonds Exempted

"The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand inhabitants, or any such city of this state, in addition to providing for the principal and interest of existing debt, shall not in the aggregate exceed in any one year two percentum of the assessed valuation of the real and personal estate of such county or city, to be ascertained as prescribed in this section with respect to county or city debt."[2]

Annual Tax Rate Limited

In ascertaining the **debt incurring capacity**,—or as it is commonly called, **the borrowing capacity**—of the City of New York under the provisions of the above section of the Constitution, there are two main questions of fact to be determined:

Determination of Borrowing Capacity

I **The debt limit**, i. e., the sum total beyond which the city may not legally incur an indebtedness;

II **The "existing indebtedness"** of the city, outstanding at the date of the inquiry.

Both the "debt limit" and the "existing indebtedness" as above defined depend upon the interpretation of the constitutional provision. Once determined, however, these two facts furnish the information for the calculation of the city's debt incurring capacity by a simple process of arithmetic.

The "debt limit" and the "existing indebtedness" of the city vary from time to time. To meet the necessity for a determination of these questions as of a fixed date, the order of reference in the above case directs that the Referee take testimony relative to the questions involved as of June 30, 1908.

Inquiry Made as of June 30, 1908

[1]Amendment of 1894 as amended in 1899
[2]Amendment of 1884

There are two similar cases before the Referee, (involving the determination of the city's debt incurring capacity) Meyer vs. McClellan, et al, and Fleischmann Realty & Construction Co. vs. McClellan, et al. In the Meyer case the Referee is directed to take testimony as of July 14, 1908. In the Fleischmann case, as in the Levy case, the Referee's inquiry is directed to be made as of June 30, 1908.

In the preparation of this Brief, only that portion of the evidence before the Referee which relates to the "debt limit" and the "existing indebtedness" of the city as of June 30, 1908, has been considered. The evidence as to all phases of the questions involved in these cases is more accurate and complete as of that date. Indeed, in many instances the evidence as of July 14 is estimated only, and totally insufficient for the determination of the questions involved. If all the legal questions involved are determined as of June 30, the computation of the debt incurring capacity of the city at any later date will be a simple process.

The question, therefore, is the city's debt incurring capacity, under Article VIII, Section 10 of the State Constitution, on the 30th of June, 1908; and that question depends upon the determination of **the constitutional debt limit** and the **then existing indebtedness of the city.**

I THE DEBT LIMIT

Determination of Debt Limit

The limit placed by the Constitution upon the power of the City of New York to incur indebtedness is as follows:

> " * * * Ten per-centum of the assessed valuation of the real estate of * * * (the) city subject to taxation, as it appeared by the assessment rolls of said * * * city on the last assessment for state or county taxes prior to the incurring of such indebtedness * * * "

With respect to the interpretation of this limitation, the Record raises three important questions:

Questions Raised by Record as to Assessed Valuation of Taxable Real Estate

A Whether real estate owned by the city and rented for private use should be considered as **real estate subject to taxation,** and as such be included in determining the total valuation forming the basis for the computation of the debt limit;

B Whether **special franchises are real estate** within the meaning of the constitutional provision, and as such to be included in the valuation of property which is to determine the debt limit;

C **Whether the assessment rolls** by which the valuation of property is to be determined, for the purpose of ascertaining the debt limit as of June 30, 1908, **are those of 1907 or of 1908.**

A CITY PROPERTY LEASED FOR PRIVATE USE

The valuation for 1907 of all city owned real estate which in that year was treated by the tax officials as exempt from taxation was $814,833,200 (the Record, p. 191). Of this total, $58,200,650 represented the valuation of "piers, bulkheads and lands under water owned by the city and under the control of the department of docks and ferries," and the sum of $3,765,000 represented the valuation of city owned markets. Mr. Lawson Purdy, president of the department of taxes and assessments, who testified to these figures, said, in reply to the Referee's question, that these valuations included all such properties irrespective of whether they were leased for private use or not (the Record, pp. 191, 192).

City Owned Real Estate Rented for Private Use

Exhibit O, in evidence, shows in detail city owned property which on December 31, 1906 was leased by the department of docks and ferries, the revenues derived from such properties, and the leases of like property made by the department since that date. **There is no evidence, however, before the Referee to show the valuation in 1907 of city owned real estate leased for private use during that year.** While the Record shows the total valuation for Record, p. 191), it does not show which of such properties were leased by the city for private use. The same is true as to the valuation of city owned markets from which revenue is derived. In the latter case the total valuation for 1907 is shown (the Record, p. 191), but there is no evidence to show what part of this property was rented for private use.

Value of Such Property not Shown by Record

If the Referee be of opinion that for the purpose of this inquiry the valuation of city owned real estate rented

for private use during 1907 should be added to the assessed valuation of taxable real estate as it appears on the assessment rolls for 1907, additional evidence will be necessary.

Such Real Estate not "Taxable Property"

It is respectfully submitted however, that the valuation of such properties should not be included in determining the constitutional limit of indebtedness, inasmuch as they are not **real estate subject to taxation** within the meaning of the constitutional provision. Is city owned real estate, rented for private use and from which the city derives a revenue, subject to taxation?

In the case of International Navigation Co. vs. Barker, 153 N. Y. 98 (1897) it was decided that such properties are not subject to taxation as the property of the lessee. Are they taxable as city property? It would be absurd for the city to tax itself.

The question remains, however, could such property be taxed "for state or county purposes"? The General Tax Law, Section 4, Clause 3, exempts from taxation "property of a municipal corporation of the state, held for a public use."

In the case of People vs. City of Brooklyn, 111 N. Y. 505 (1888), it was held that premises in the City of Brooklyn owned by the City of New York and used as the landing for the Fulton Street Ferry were exempted from taxation by the City of Brooklyn, despite the fact that the ferry and the landing were leased by New York City to lessees who paid to the city a rental for its use. The court said:

> "The fact that the City of New York operates the ferry through lessees and derives its revenues from the rental and not from the operation of the ferry by its immediate agents and servants, does not make the franchise or the landing taxable."

It may well be argued that city properties leased for private use are none the less **held by the city for public use since** the revenues derived from such leases are paid into the sinking fund for the redemption of the city debt, or into the general fund for the reduction of taxation.

The property which is to form the basis for determining the debt limit of the city is the **real estate**

subject to taxation as it appeared by the assessment rolls in the last assessment. Real estate owned by the city and rented for private use does not appear on the assessment rolls. It is included in the books recording the valuation of property, but it is not included in the assessment rolls which are used as the basis for fixing the tax rate and upon which the tax levies are extended (the Record, pp. 186, 187; the General Tax Law, Sections 15 and 21; the City Charter, Chapter 17).

Such Real Estate not on Assessment Rolls

In the case of Chicago vs. Fishburn, 189 Ill. 367 (1901), it was held that the term "assessment," as used in the Illinois Constitution,—which as to this matter is almost identical with that of New York—means the assessment upon which the annual taxes are levied.

It is respectfully submitted that the assessment roll, as finally made up, is conclusive of the question of the valuation of taxable property. If property though technically subject to taxation is not assessed as taxable, it ought not to be made the basis for power to incur debt. If such property is improperly omitted from the assessment rolls, the remedy lies in the revision of the rolls, but such revision ought not to be undertaken in a collateral proceeding.

Assessment Rolls Conclusive of Valuation of Taxable Property

B ARE "SPECIAL FRANCHISES" REAL ESTATE, WITHIN THE CONSTITUTIONAL LIMITATION OF MUNICIPAL DEBT?

"Special franchises" are taxed as "real estate," under the provisions of the General Tax Law, which provides in Section 2, Clause 3:

"Special Franchises"

> **"The terms 'land,' 'real estate' and 'real property,' as used in this chapter,** include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; **all surface, underground or elevated railroads, including the**

Taxable as Real Estate under Tax Law

value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein, or that is protected thereby, **including the value of all franchises**, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A **franchise**, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a '**special franchise.**' A **special franchise** shall be deemed to include the value of the **tangible property** of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. **The tangible property so included shall be taxed as a part of the special franchise.** No property of a municipal corporation shall be subject to a special franchise tax." (Subdivision amended by L. 1899, ch. 712).

The above provision by which "special franchises" are expressly included within the meaning of the term real estate, is limited by the tax law to that particular statute. It does not necessarily follow that the words "**real estate subject to taxation**" as used in Article VIII, Section 10 of the Constitution must likewise be understood to include special franchises. The constitutional restriction limiting the debt incurring capacity of cities to ten per cent of the valuation of **real estate subject to taxation** had been in existence for fifteen years at the time[1] of the passage of the tax law which classified special franchises as taxable real estate.

[1] 1899

It is unquestionably true that no enactment of the Legislature can vary or qualify a previously existing constitutional provision. The Constitution is the fundamental law. Under its provisions limiting municipal indebtedness, the Legislature has no more power to authorize the incurring of debt in excess of the limit than the municipality has to incur it without such authorization. Therefore, if the term "real estate," as used in the Constitution, was intended to mean "lands and tenements" only, the Legislature could not by any enactment extend its meaning so as to include property rights not theretofore included. If, however, the words "real estate subject to taxation." etc., as used in the Constitution include the property rights known as special franchises, the fact that such property was not taxable at the time the constitutional provision was enacted would not prevent the inclusion of the valuation of such special franchises in the valuation of property which is to determine the constitutional debt limit. The question is raised, therefore, whether special franchises are real estate, within the meaning of the Constitution.

Meaning of "Real Estate" as Used in Art. VIII § 10 Const.

Washburn on "Real Property," says: "Real property includes lands, tenements and hereditaments * * * This broader term hereditaments is itself divided into two classes, namely, corporeal and incorporeal." (Vol. I, 6th ed. p. 34.)

The same author says: "Incorporeal real property may be divided into rents, **franchises** and easements." (Vol. II, p. 248.) At p. 265, franchises are defined as: "Special privileges conferred by government on individuals * * * These privileges are usually granted to and held by corporations."

Definitions of "Real Estate"

In the case of People vs. Tax Commissioners, 174 N. Y. 417, which held the special franchise tax law constitutional, it was said that a special franchise is the right to construct, maintain and operate in a public highway some structure intended for public use, which, except for the grant, would be a trespass. The tangible property placed under or upon the highway in connection with the exercise of this right is included in the "special franchise."

Decisions of New York Courts

Prior to 1899, special franchise rights were not taxable under the tax laws of New York. **This does not**

mean that these rights were not real estate. It simply means that they were not included in the kinds of real estate which in the tax laws then existing were designated as property subject to taxation.

In the case of People vs. Cassity, 46 N. Y. 46 (1871), it was held that the right to maintain a railway track attached to the soil in a public highway was an easement or interest in land, and as such, real estate. In Smith vs. Mayor, 68 N. Y. 552 (1877), a franchise was said to be unalterably attached to land and incidental thereto, and as such was an incorporeal hereditament. To the same effect is the case of People vs. O'Brien, 111 N. Y. 1 (1888).

Franchise a Real Incorporeal Hereditament

It is therefore submitted that the property rights designated by the tax laws as **special franchises are incorporeal hereditaments** appertaining to and incidental to land, **and as such, real estate,** within the well-known meaning of that term.

Immovable Property the Basis for Debt Limit

Moreover, it is suggested that the term "real estate," as used in the Constitution, was intended to mean **immovable property** as distinguished from **movable or personal property.** This is a well established distinction between real and personal property. It is particularly appropriate in this connection, for personal property, being subject to the power of its owner to remove it beyond the taxing power of the community, would not be a proper basis for allowing the present generation to incur indebtedness payable in the future. Immovable property, however, has a fixed **situs** and will in all probability contribute in the future to the payment of a debt incurred at the present time. Like land, special franchises represent a value incapable of removal from the taxing power of the community, to be enjoyed elsewhere.

Courts Have Held Special Franchises "Real Estate" within Art. VIII § 10

In the case of Kronsbein vs. Rochester, 78 N. Y. Supp. 813 (1902), it was contended that the value of special franchises should not be included in the valuation of real estate for the purpose of determining the debt limit of the city. The court expressed the unqualified opinion that such franchise valuations should be included in the real estate valuations. This opinion, however, is worth little as authority. It was unnecessary in the determination of the issue before the court, which was disposed of by the

court's decision that the contract before it was not a city debt.

Constitutional Limitation since Tax Amended Law Made Franchises Real Estate

To hold that special franchises are to be included in property whose valuation is to determine the constitutional limitation of the city debt, does not necessarily involve the conclusion that the Legislature has extended the meaning of a pre-existing constitutional provision, for Article VIII, Section 10 of the Constitution has been amended and re-enacted as a whole on two different occasions since the passage of the special franchise tax law of 1899. It may well be said that the people in re-enacting the constitutional provision in its amended form in the years 1905 and 1907 adopted the meaning given to "real estate" by the Legislature in the Tax Law, and therefore intended that special franchises be included in the valuation of real estate for this purpose.

Assessment Rolls Conclusive and Special Franchises Appear There as "Real Estate"

Moreover, it is submitted that as in the case of city owned property, the assessment rolls are conclusive of this question. Under Section 42 of the Tax Law, the assessment of special franchises is made by the state board of tax commissioners and by that board forwarded to the department of taxes and assessments in New York City, to be entered by the assessors in the proper column in their assessment rolls. **The proper column is the real estate column** (Section 2 Clause 3 and Section 21 of the Tax Law). The **valuation of special franchises appears** in the **assessment rolls** of New York City **as real estate** of corporations. The Constitution is clear that the debt limit is to be determined from the valuation of real estate ~~City as real estate of corporations. The Constitution is~~ subject to taxation as it appeared by the assessment rolls on the last assessment. That assessment as it appeared on such rolls in 1907 included the valuation of special franchises. The law required such valuations to be so included on the assessment rolls.

Usefulness of Debt Limitation Depends upon Finding the Debt Limit Readily

The constitutional limitation of the debt incurring capacity of municipalities was intended to prevent extravagance and carelessness on the part of the present generation in pledging the credit of the community at the expense of the future. Its purpose can best be accomplished by an interpretation which avoids legal technicalities.

It ought, therefore, to be held that the assessed valuation of real estate in the meaning of the Constitution, is the valuation that appears on the assessment rolls. If this is not true, then no purchaser of the city's bonds and no bidder for city contracts will be safe in dealing with the city on credit until he has gone into the entire question of the preparation of the tax rolls, to see whether the property therein included as real estate is actually real estate.

Analysis of Rolls to Determine "Taxable Real Estate" Impracticable

No such analysis of the tax rolls was made for the benefit of the Referee, other than the separation from all other property that portion which represented special franchises. It is improbable that the framers of the Constitution intended to make the determination of the debt limit dependent upon any such analysis, and this improbability suggests the probability that the total valuation of real estate as shown in the real estate column of the assessment rolls was intended to be conclusive until legally changed or revised. The Supreme Court of Pennsylvania has so held in the case of Browne's Appeal, 111 Pa. 72 (1885). If this be true, then the determination of the city's debt limit, that is, the sum total of debt which the city may carry at any time, becomes a mere matter of the arithmetical calculation of ten per cent of the total valuation appearing in the real estate column of the assessment rolls.

Therefore Rolls Conclusive until Corrected by Direct Appeal

C WHAT ASSESSMENT ROLL DETERMINES THE DEBT LIMIT AS OF JUNE 30, 1908?

The Constitution bases the debt limit upon the "last assessment for state or county taxes prior to" the date as of which the limit is to be ascertained.

From What Assessment Rolls Is Valuation of Property To Be Taken

Under the provisions of the City Charter, Sections 907, 911, the annual assessment rolls are required to be delivered by the board of taxes and assessments to the board of aldermen on the first Monday of July in each year. The board of aldermen has the power to change the assessments as they appear on these rolls, but the power is seldom exercised (Record, p. 185). The aldermen apply the assessed valuation as it appears in the assessment rolls to the

amount required to be raised in the annual tax levy, and assess each taxpayer proportionately.

The last assessment referred to by the Constitution is, obviously, not the tentative assessment made by the department of taxes, but the final assessment fixed by the aldermen. (Culberson vs. Fulton, 127 Ill. 30 (1888) The last assessment prior to June 30, 1908, was that forwarded by the department of taxes and assessments to the board of aldermen on the first Monday of July, 1907, and made the basis for the tax levy of 1907. In that assessment the aggregate valuation of real estate was $6,240,480,602. This aggregate included the valuation of special franchises in the sum of $466,855,000 (the Record, p. 321).

Assessment Rolls of 1907 Were "Last" as of June 30, 1908

Valuation of Real Estate for 1907

The debt limit, as of June 30, 1908, according to whether the valuation of special franchises be included or excluded, was either:

(a) Ten per cent of $6,240,480,602 the total aggregate valuation of real estate as it appeared in the assessment rolls.....$624,048,060.20

or (b) Ten per cent of $5,773,625,602, the total valuation of real estate, less the valuation of special franchises $557,362,560.20

It is respectfully submitted that the debt limit of the city of New York, as of June 30, 1908, was ten per cent of the valuation of real estate, including special franchises, as shown on the assessment rolls of 1907, namely, $624,048,060.20.

The "Debt Limit" on June 30, 1908

II "EXISTING INDEBTEDNESS" OF THE CITY OF NEW YORK ON JUNE 30, 1908

When " the debt limit" of the city as of June 30, 1908, has been fixed, there remains to be determined the "existing indebtedness" of the city on that date. The constitutional provision is that "no county or city shall be allowed to become indebted **for any purpose or in any manner** to an amount which, including **existing indebtedness**, shall exceed, etc."

Meaning of "Existing Indebtedness" as Used in Constitutional Debt Limitation

The city is forbidden to become indebted for any purpose or in any manner in excess of a certain total of "existing indebtedness." This use of the terms "indebted" and "indebtedness" necessitates the conclusion that **"existing indebtedness" as here used was intended to refer to all amounts for which the city had previously "become indebted for any purpose or in any manner."**

Classification of City's Obligations and Liabilities

With reference to the time and manner of their payment, the liabilities, obligations and indebtedness of the City of New York on June 30, 1908 may, for the purpose of determining the city's "existing indebtedness," be divided into two general classes:

A Obligations chargeable to appropriation accounts; that is, payable out of the current taxes or other revenues in pursuance of budget appropriations.

B Bonds; and obligations chargeable to bond accounts, or secured by the general credit of the city, and payable out of taxes or other revenues to be levied and provided in the future.

A OBLIGATIONS CHARGEABLE TO APPROPRIATION ACCOUNTS

Under this heading are intended to be grouped all those obligations and liabilities entered into and incurred by the city under authority of an appropriation contained in the annual budget. The budget of annual appropriations is made by the board of estimate and apportionment under the provisions of Section 226 of the City Charter, which enacts:

Charter Provisions as to Appropriation Accounts

> "Prior to December 25th, in each year, the budget as finally adopted pursuant to the provisions of this section shall be certified by the mayor, comptroller and city clerk, whereupon the said several sums shall be and become appropriated to the several purposes therein named."

These appropriations and the liabilities incurred in pursuance of them are payable from the annual revenues of the

city's general fund for the reduction of taxation and from the proceeds of the annual tax levy (City Charter, Section 900); and each officer and department of the city is forbidden to expend for the purposes included in the appropriations a greater sum than is allowed therefor in the budget. (City Charter, Section 1542)

Undoubtedly, obligations of the city outstanding June 30, 1908, incurred by virtue of the appropriations contained in the annual budget were in some sense debts and indebtedness of the city; but it is generally conceded that such obligations are not within the "indebtedness" referred to by Article VIII, Section 10 of the Constitution. They are current expenses payable out of the current revenues duly levied or provided for. Gray, in his "Limitations of Taxing Power," says: "Constitutional debt limits are intended to make cities and states pay as they go, but they are not intended to make them pay in advance." And the same author suggests the following rule: "A municipality may bargain for the purpose of its ordinary supplies and the rendition of ordinary service to it in advance of the furnishing of such supplies or the rendition of such services, so long as its bargainings contemplate no greater expenditure than the ordinary revenues applicable to such expenditure (pp. 1061-62).

Appropriation Liabilities Represent City Obligations but not "Existing Indebtedness"

In the case of Wade vs. Oakmont Borough, 165 Pa. 479 (1895) the court says: "If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can be lawfully made to them, however great the indebtedness of such municipality may be, for in such case their engagements do not extend beyond their present means of payment **and so no debt is created.**"

Decisions of Courts

In the case of Walla Walla vs. Water Company, 172 U. S. 1 (1898) the United States Supreme Court said: "The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality." To the same effect are the decisions of the following cases:

Addyston Pipe and Steel Co. vs. Corry, 197 Pa. 41
Dallas Electric Co. vs. Dallas, 58 S. W. Rep. 153 (1900 Texas)
Denver vs. Hubbard, 68 Pa. Rep. 993 (1902 Colorado)

In the case of Bank vs. Grace, 102 N. Y. 313 (1886) the court said: "We think it plain that the indebtedness here referred to is an indebtedness **to be met in the future by taxation.**"

Appropriation Accounts not To Be Included

Such obligations may therefore be omitted from the computation of the "existing indebtedness" of the city of New York for the purpose of determining its constitutional debt-incurring capacity.

The status of **Revenue Bonds** issued for the purpose of providing funds to meet expenditures payable from appropriation accounts in advance of the collection of the annual revenues, is treated under the heading "**Revenue Bonds**" infra, page 31.

B BONDS; AND OBLIGATIONS CHARGEABLE TO BOND ACCOUNTS, OR SECURED BY THE GENERAL CREDIT OF THE CITY

Classification of Liabilities Other Than Appropriation Accounts

Under this heading it is intended to group all bonds outstanding on June 30, 1908, and all obligations, then existing, assumed or incurred by the city in any manner or for any purpose, for the payment of which no provision other than an authorization for the issue of bonds had been made. Liabilities of this class appearing on the record before the referee may be grouped under the following headings:

1 **City Bonds**
2 **Contracts for Public Improvements**
3 **Liability to Make "Just Compensation" for Private Property Taken for Public Use**
4 **Judgments**
5 **Disputed Claims not Reduced to Judgment**
6 **Miscellaneous**

1 CITY BONDS

Are All City Bonds "Existing Indebtedness"?

Outstanding bonds are the absolute and binding debts of the city within the usual meaning of the terms "debt" or "indebtedness." The question in this case, however, is whether such bonds are "existing indebtedness" within the

constitutional provision under consideration. As to some of these bonds, it is expressly declared by the constitution that they shall not be considered indebtedness of the city in the computation of its "existing indebtedness" for that purpose. As to others, judicial interpretation of the constitutional provision has eliminated some, and may eliminate others, from the computation.

The bonded debt of the city of New York on June 30, 1908, may, for the purposes of this computation, be divided into two main classes:

Classification of Bonds

(a) Bonds issued prior to January 1, 1898 by municipal corporations within the territory now comprised in the City of New York, hereinafter referred to as "bonds of constituent corporations." These bonds were made the common debt of the Greater City by Sections 1, 4 and 5 of the present charter.

(b) Bonds issued subsequent to January 1, 1898 by the City of New York. These bonds are either:

(1) Corporate stock for purposes other than the water supply
(2) Corporate stock for the water supply
(3) General fund bonds
(4) Assessment bonds
(5) Special revenue bonds
(6) Revenue bonds ("in anticipation of taxes")

The bonds of the several classes above enumerated outstanding on June 30, 1908, as shown by the record and "Exhibit A" may be summarized as follows:

"Bonds of Constituent Corporations":

Issued by former New York City including towns in annexed territory of Westchester County (Ex. A—pp. 35-61 incl.)		$134,979,122.78
Issued by Brooklyn (Ex. A—pp. 63-72 incl.)		51,339,317.17
Issued by cities and towns (other than Brooklyn) in Kings County (Ex. A—pp. 73-79 incl.)		2,763,000.00
Issued by cities and towns in Queens County (Ex. A—pp. 81-105 incl.)		7,018,664.59
Issued by cities and towns in Richmond County (Ex. A—pp. 109-117 incl.)		983,686.18
Issued by Counties of:		
New York (Ex. A—p. 62)	$8,699,000.00	
Kings (Ex. A—p. 80)	8,225,000.00	
Queens (Ex. A—p. 106-7)	1,323,000.00	
Richmond (Ex. A—p. 108)	3,551,279.64	21,808,279.64
Total "Bonds of Constituent Corporations"		$218,892,070.36

Bonds issued by the City of New York:

Corporate stock for purposes other than water supply

Rapid transit (Ex. A—pp. 26-27; Record p. 316)	$52,894,000.00	
Docks (Ex. A—p. 22)	26,000,000.00	
Other specific purposes (Ex. A—pp. 1-27 incl.)	150,066,584.58	
"Various municipal purposes" (Ex. A—pp. 26-27)	190,761,678.26	$419,722,262.84

Corporate stock for water supply

Issued from Jan. 1, 1908 to Dec. 31, 1903	$19,270,844.74	
Issued from Jan. 1, 1904 to June 30, 1908 (Record p. 259)	38,937,318.26	$58,208,163.00

General fund bonds

(Ex. A—pp. 30, 119)	$54,250,000.00

Assessment bonds

(Ex. A—pp. 31, 32; Record p. 263)	$28,370,632.65

Special revenue bonds

(Ex. A—p. 33)

Issued in 1907	$2,890,000.00	
Issued in 1908	3,652,000.00	$6,542,000.00

Revenue Bonds "In anticipation of taxes" (Record, p. 85)

Year of Issue	Year of Tax Levy			
1905	1902	$ 100,000		
1905	1903	5,000,000		
1905	1904	$1,000,000		
1907		2,259,000	3,259,000	
1907	1905	7,000,000		
	1906	$9,000,000		
1907		376,210	9,376,210	$24,735,210.00
1907	1907		20,673,776.92	
1908	1908		73,856,000.00	$119,274,986.92

Total bonds issued by City of New York Outstanding June 30, 1908	$686,368,045.41
Total "Bonds of Constituent Corporations" Outstanding June 30, 1908	218,892,070.36
Total Bonds Outstanding June 30, 1908	$905,260,115.77

Prima facie, all of the above bonds represented indebtedness of the City of New York on June 30, 1908. In determining the city's "existing indebtedness," however, on that date, it is necessary to consider the proper interpretation of the constitutional provision and its application to the several kinds of obligations which these bonds represent. Questions as to the inclusion or exclusion of certain classes of these bonds in computing the "existing indebtedness" of the city and the effect on the amount of this indebtedness of certain assets of the city are raised by the Record as follows:

What City Bonds are "Existing Indebtedness" within Art. VIII § 10?

(a) County bonds	Expressly excepted by the constitution, p. 22
(b) Rapid transit bonds (c) Dock bonds	Query whether income-producing nature of rapid transit and dock properties exempts these bonds, pp. 22-23
(d) Water bonds	A debt incurred subsequent to Jan. 1, 1904, expressly exempted; query as to interpretation, p. 23
(e) General fund bonds	Query as to indebtedness, p. 26
(f) Assessment bonds	Query as to indebtedness and as to effect of uncollected assessments, p. 27
(g) Special revenue bonds	Query as to indebtedness, p. 30
(h) Revenue bonds	("In anticipation of taxes"); interpretation of constitutional exemption, p. 31
(i) Effect of sinking fund holdings	Query as to deduction from bonded debt, p. 37
(j) Effect of available budget appropriations for redemption of bonded debt, p. 50	

Questions of Interpretation respecting City Bonds

These several possibilities of deductions from the total bonded debt of the city in determining its "existing indebtedness" will be considered in the above order.

(a) County Bonds.....$21,808,279.64

The constitutional debt limitation provides:

> "Whenever the boundaries of any city are the same as those of the county, or when any city shall include within these boundaries more than one county, the power of any county, wholly included within such city, to become indebted shall cease; but the debt of the county heretofore existing, shall not, for the purpose of this section, be reckoned as a part of the city debt."

County Bonds Exempted

Under this provision it is clear that the **bonds issued by the counties** of New York, Kings, Queens and Richmond, all of which are now included within the boundaries of the City of New York, **are not to be computed as a part of the city's "existing indebtedness" in determining its power to incur additional debt.**

(b) Rapid Transit Bonds.....$52,894,000.00

The rapid transit railways constructed and equipped with the proceeds of these bonds are operated by lessees who, by their leases, are required to pay annually to the city the amount of the annual interest on and an annual sum sufficient to redeem at maturity such of these bonds as represent the cost of rapid transit railways in operation. (Record, pp. 303-307).

Rapid Transit Bonds not Exempted

These bonds are the obligations of the city. The fact that the city derives revenue from the improvements constructed with their proceeds, does not change their character as evidences of city indebtedness. Only an express exception in the Constitution itself can eliminate them from the computation of the city's "existing indebtedness," and there is no such exception.

If rapid transit were to be treated as exempt from the city's debt, because of the above provision for their payment, there would seem to be no good reason why the same principle should not be applied to all bonds redeemable from sinking funds maintained by the revenues of city properties, e. g., the sinking fund for the redemption of city debt, No. 1. It will readily be seen that by the application of such a principle the constitutional limitation would in large part be nullified.

(c) Dock Bonds $87,870,840.00

The above total is made up as follows:

Bonds issued by former City of New York prior to Jan 1, 1898 (Exhibit A, pp. 55 & 58)	$28,274,200
Corporate stock issued by the City of New York for dock purposes specifically (Exhibit A, p. 22)....	26,000,000
Corporate stock issued by City of New York for "various municipal purposes" transferred to dock purposes (Exhibit A, p. 27).....	33,596,640
Total (Record, p. 317).....	$87,870,840.00

The contention that dock bonds are not indebtedness of the city, within the meaning of the constitutional provision, is based on the same reasoning as that advanced for the deduction of the rapid transit bonds, and the same principles apply to it.

Dock Bonds not Exempted

It is respectfully submitted that all the rapid transit and dock bonds outstanding on June 30 represented "existing indebtedness" of the city, and that only an amendment to the Constitution would justify their elimination from the computation of the city debt for this purpose.

A resolution proposing the submission of such an amendment to the people is now pending before the State Legislature (concurrent resolution of April 21, 1908, Gen. Laws, pp. 1920-1923).

(d) Bonds To Provide for the Supply of Water $58,208,163.00

This total may be divided as follows:

Issued between Jan 1, 1898 and Jan. 1, 1904....	$19,270,844.74
Issued subsequent to Jan. 1, 1904.....	$38,937,318.26

Special Provision as to Water Bonds

With respect to these bonds the Constitution contains the following provision:

> " * * * Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water."

This provision was interpreted in the case of Adams vs. Savings Institution, 20 N. Y. Supp. 12 (1892) as meaning that bonds to provide for the water supply might be issued despite the fact that the city had previously reached or exceeded its debt limit, but that such bonds when outstanding should be computed as part of the city debt, for the purpose of determining the power of the city to become further indebted for other purposes. This decision was, in effect, written into the Constitution by an amendment of 1894 which provides:

Additional Provisions as to Water Bonds

> "Bonds issued to provide for the supply of water * * * shall be included in ascertaining the power of the city to become otherwise indebted."

And a subsequent amendment of 1905 provides as follows:

> "Except that debts incurred by the City of New York after the first day of January, 1904 * * * to provide for the supply of water, shall not be so included."

Under these several constitutional provisions any of the above bonds which were issued to provide funds for the payment of **debts incurred** after January 1, 1904, **"to provide for the supply of water,"** are removed from the computation of the city's "existing indebtedness." The interpretation of these provisions and their application to the evidence before the Referee involves two important questions:

Water Debt Incurred after Jan. 1, 1904, Exempt

> What portion of the proceeds of water bonds issued subsequent to Jan. 1, 1904 was used to pay debts incurred prior to that date?

Questions of Interpretation

> What is included within the words "to provide for the supply of water"? Do they include the cost of constructing and establishing the high pressure water system?

Water Debt Incurred prior to Jan. 1, 1904, Paid out of Proceeds of Bonds thereafter Issued

As to the first of these questions the record shows two items:

One of (Record, p. 257)	$5,769,064.13
and the other (Record, p. 258)	2,492,244.42
making a total of	$8,261,308.55

representing the amount of cash taken from the proceeds of water bonds issued subsequent to January 1, 1904 to pay liabilities arising under contracts registered and land liability incurred prior to January 1, 1904. The constitutional provision is that **debts incurred after the first day of January, 1904** shall not be included in determining the city's indebtedness. The provision refers not to **bonds issued,** but to **debt incurred.**

Such Debt not Exempted

It is respectfully submitted that the debts liquidated with the above mentioned sum of $8,261,308.55 were incurred, not when the bonds to provide the funds for their liquidation were issued, but when the contracts were made. For a further statement of the principles and authorities upon which this conclusion is based, see the sub-division "Contracts," infra, p. 53.

Does "Supply of Water" Include High Pressure Fire System

As to the second question, namely,—Does the exemption from the city's indebtedness of debts incurred to provide for "the supply of water," apply to debts incurred on account of the construction and establishment of the high pressure water system?—it is suggested that, although the Constitution does not expressly say that the reason for the exemption of debts incurred to provide for the water supply is that the water revenues of the city are sufficient to pay the annual interest and redemption charges on such debt, it has nevertheless been generally considered that the income-producing power of the city's water supply was the real reason for this exemption. If this be true, it would seem to follow that the establishment of the high pressure system is not within the intent of the exemption.

Additional Evidence Needed as to Cost of High Pressure System

It is, therefore, respectfully submitted that the Referee should ascertain the amount of the proceeds of water bonds issued since January 1, 1904 which has been applied to the liquidation of debt incurred in the establishment of the high pressure system. This evidence is not now upon the Record, but it is suggested that the books of the department of finance will show that the sum of $4,954,250.00

now treated as exempt, because expended for the water supply, was in fact expended for the high pressure system.

It is respectfully suggested that this item will be a necessary part of the Referee's report, if the court is to "have before it all the evidence relating to the indebtedness of the city and the various classifications thereof, and to be thus enabled to determine therefrom the amount of existing indebtedness coming under constitutional limitations," as required by the order of reference. It may be that additional inquiry by the Referee as to the use made of proceeds of the so-called water bonds will disclose expenditures for other purposes not properly within the words "to provide for the supply of water," as used in the Constitution.

Summarizing the evidence as to the water debt incurred subsequent to January 1, 1904, the record shows:

Summary of Exempt Water Debt

Bonds issued since Jan. 1, 1904	$38,937,318.26
Less proceeds applied to debt incurred prior to Jan. 1, 1904	8,261,308.55
Less the possible deduction of proceeds applied to high pressure system	4,954,250.00

Therefore, the constitutional exemption of debt incurred to provide for the supply of water reduces the total bonded debt of the city, either

in the amount of $30,676,009.71

or, if the high pressure debt be excluded from the exemption

in the amount of $25,721,759.71

(e) General Fund Bonds $54,250,000.00

General Fund Bonds Held by Sinking Fund

These bonds were issued to and are now held by the sinking fund for the redemption of city debt, No. 1. They represent the excess revenues of that fund, transferred to the general fund for the reduction of taxation, in accordance with Section 222 of the City Charter. The question whether these bonds should be considered "existing indebtedness" of the city, is considered under the sub-division "Sinking Fund Holdings," infra, p. 37.

(f) Assessment Bonds $34,614,833.45

This total is composed of:

Classification of Assessment Bonds

Assessment bonds issued prior to Jan. 1, 1898, by the several cities and towns merged in the City of New York (Exhibit A, pp. 59; 72-79; 88; 96; Record, p. 263)	$6,244,200.80
Assessment bonds issued by the City of New York since Jan. 1, 1898 (Exhibit A, pp. 31, 32; Record, p. 263)	$28,370,632.65

Definition

Assessment bonds may be described as bonds issued to provide funds to carry on public improvements, the cost of which will be assessed wholly or in part against private property benefited by such improvements.

When not Debts of City

Where such bonds and the laws authorizing their issue expressly provide that they shall be payable from a fund produced by collections of assessments against such private property, but that they shall not in any event become a general charge against the municipality which issued them, it has been held by the courts of this and other states that they are not debts of the municipality within the constitutional provision.

Quill vs. Indianapolis, 124 Ind. 292 (1890)
Kelly vs. Minneapolis, 63 Minn. 125 (1895)
Kansas City vs. Ward, 134 Mo. 172 (1896)
Allen vs. Davenport, 77 N. W. 532 (1898)
Addyston Pipe & Steel Co. vs. Corey, 197 Pa. 41 (1900)
McGilvery vs. Lewiston, 13 Idaho 338 (1907)

In the case of Kronsbein vs. Rochester, 78 N. Y. Supp. 813 (1902), a city contract for an improvement expressly provided that the city should not be required to make payment on account of the work done under the contract any sooner or faster than there should be money in the city treasury, collected or paid into the treasury on account of assessments for such improvement. It was held that this contract did not create a city debt. The court said:

"Where a municipality has the funds on hand to meet the expense of an improvement made, or has in the ordinary mode of procedure provided by statutory authority to raise the money by assessment and tax to meet the particular expenditure, and the compensation is to be paid from that fund, there is no infraction of the constitutional debt limitation, even though the sum to be paid overruns that boundary."

See also Baldwin vs. Oswego, 1 Abb. N. Y. Court of Appeals Decisions 62 (1865)

The same rule has been applied to certificates issued to contractors for the cost of improvements payable from assessments levied upon private property.

Davis vs. Des Moines, 71 Iowa 500 (1887)
Tuttle vs. Polk, 92 Iowa 443 (1894)

In the case of Corey vs. Fort Dodge, 133 Iowa 666 (1907), the court said:

"Contracts for street improvements made under a statute providing therefor, the cost of which is to be assessed against the abutting property and payment therefor made by delivering to the contractor the assessment certificates, with the special provision specifying the manner in which probable deficiencies shall be raised, do not, in our judgment, create a municipal indebtedness within the meaning of the constitutional provision on that subject."

When Assessment Bonds Are City Debts

Where, however, assessment bonds are issued as the general obligations of the city, and the assessments are referred to merely as the source from which the city expects to obtain funds with which to redeem the bonds, they are debts of the city within the constitutional provision.

Fowler vs. Superior, 85 Wis. 411 (1893)

The following rule, as stated in Abbott's Municipal Corporations, Vol. 1, Sec. 152, seems to accord with the deciding cases:

"If the bonds or obligations in their form and recitals are not a general liability of the corporation but payable principal and interest from the proceeds of the special taxes or assessments levied upon benefited property, and if the holders are limited in their recovery to

such sums as can be collected from these special or local assessments, then the bond or other evidence of indebtedness is not to be regarded as a general debt or charge against the municipality and should not be included within its indebtedness in determining whether the constitutional limitation has been reached. If, however, the form of such bonds or evidence of indebtedness is of a general character or nature and does not limit the holder in his right of recovery to such special assessments or taxes, then they will be considered as obligations or indebtedness of the city to be included within its total or aggregate debt."

In order to apply this rule to the assessment bonds of the City of New York outstanding June 30, 1908 it is necessary to consider the nature of the city's liability therefor as to the assessment bonds issued prior to 1898 by the constituent corporations of the present City of New York, to wit, ...$6,244,200.80

Assessment Bonds of Constituent Municipalities Are City Debts

It would seem that irrespective of provisions of the particular laws under which they were originally issued they have become general liabilities of the present city under Sections 1, 4 and 5 of the Charter. However this may be, there is certainly nothing upon the Record to show that these bonds are **not** the general obligations of the city and therefore its debts.

The assessment bonds issued by the City of New York since January 1, 1098 to wit,.....$28,370,632.65 with the exception of a few minor items, were issued under the provisions of Sections 173 and 174 of the Charter to pay awards in street and park opening proceedings, and under the provisions of sections 179, 181, 183 and 184 to pay the cost of street improvements, etc. These sections provide for the creation of a "street and park opening fund," and a "street improvement fund," into which funds the proceeds of assessment bonds sold and assessments collected are to be paid, and authorize the use of such funds for the redemption of the assessment bonds. There is no provision, however, limiting holders of assessment bonds to these funds for payment of their securities.

Assessment Bonds Issued under Present Charter Are City Debts

Moreover, the bonds themselves do not limit the holders to payment from any particular fund. They are unqualified obligations of the City of New York secured by its general credit (see Exhibit B, copy of assessment bond form).

Form of Assessment Bond

It follows that these assessment bonds are the general obligations of the city and as such a part of its "existing indebtedness."

Assessments Due City

As to a part of the indebtedness evidenced by these assessment bonds the city expects to be reimbursed by the collection of assessments levied against private property. On June 30, 1908 there were uncollected assessments in the sum of .....$25,016,198.40 (Record, p. 199). These uncollected assessments were assets of the city; but despite these assets the indebtedness represented by the assessment bonds existed. The assessments, if collected, may or may not be applied to the payment of this indebtedness. There is no certainty that the assessments will be collected. Moreover, if collected, there is no certainty that the money received will be applied to the payment of assessment bonds outstanding June 30. It may, in the discretion of the city officials, be used to liquidate new indebtedness incurred subsequent to that date. Manifestly, such an asset should not, in the absence of an express exception in the Constitution, be considered as reducing the "existing indebtedness." See Kronsbein vs. Rochester, 78 N. Y. Supp. 813 (1902).

Not an Offset to Assessment Bonds

Total Debt Represented by Assessment Bonds

It is, therefore, respectfully submitted that the above assessment bonds in the sum of.....$34,614,833.45 should be included in the computation of the city's "existing indebtedness" on June 30, 1908.

(g) Special Revenue Bonds.....$6,542,000.00

This total may be divided as follows:
Issued in 1907 .....$2,890,000
Issued in 1908 .....$3,652,000

The City Charter, Section 187, authorizes the issue of revenue bonds in anticipation of the collection of the annual revenues of the city, and provides that such bonds shall be redeemed out of the city revenues when collected.

The same section then provides:

Authority to Issue—City Charter

> "Whenever the comptroller may be authorized by the provisions of this act or by law, heretofore or hereafter indicated, to issue **revenue bonds for purposes other than to meet expenditures under the appropriations for each current year,** such revenue bonds **shall be redeemed out of the tax levy for the year next succeeding the year of their issue,** and the necessary appropriations therefor shall be made by the board of aldermen and the board of estimate and apportionment in the budget for such year. Such last mentioned bonds may be designated and **known as special revenue bonds."**

These bonds are the general obligations of the city. The credit of the corporation is pledged to secure their payment. They represent indebtedness for whose payment provision must be made in the future. Until such provision is actually made they should be considered "existing indebtedness," within the meaning of the constitutional limitation. But when, in pursuance of the above quoted section of the Charter an appropriation is made for their redemption, they are not unlike revenue bonds issued in anticipation of the collection of taxes, in that they are payable out of taxes levied or provided for, when collected.

Nature of Obligation

The budget for 1908 contained an appropriation for the redemption of the above special revenue bonds issued in 1907, viz. .....$2,890,000.00 and this appropriation was available on June 30, 1908. The effect of this appropriation upon the question whether the said bonds of 1907 were "existing indebtedness," is considered under the sub-heading "Effect of Available Budget Appropriations," etc., infra, p. 50.

Effect of Appropriation for Redemption

As to the above special revenue bonds issued in 1908, viz. .....$3,652,000.00 **it is submitted that they should be computed as part of the city's "existing indebtedness" on June 30.**

Certain Special Revenue Bonds "Existing Indebtedness"

(h) Revenue Bonds ("in anticipation of taxes") $119,274,986.92

These bonds are peculiar, in that, like obligations chargeable to appropriation accounts (see I, supra, p. 16) they **are redeemable out of taxes or revenues levied or provided for.**

The annual appropriations for current expenditures become available on January 1 of each year, but the annual taxes are not due until October 1. Funds to meet current expenditures made prior to collection of the taxes are obtained by issuing revenue bonds in anticipation of taxes.

Section 187 of the Charter provides:

Authority to Issue- City Charter

"The comptroller is authorized to borrow from time to time on the credit of the corporation **in anticipation of its revenues and not to exceed in amount the amount of such revenues such sums as may be necessary to meet expenditures under the appropriations for each current year.** * * * Such amounts shall be obtained by the issue of revenue bonds which shall be redeemed out of the proceeds of the tax levy, in anticipation of the collection of which such bonds were issued."

When issued in Practice

In practice revenue bonds are issued not only in anticipation of **taxes to become due**, but also in anticipation of the collection of **taxes due but unpaid**, including in this latter class **taxes in arrears.** To illustrate: Revenue bonds were issued in 1907 as follows: (a) Bonds issued prior to October 1 in anticipation of and payable out of the taxes for 1907 which became due and payable on October 1 of that year; (b) Bonds issued between October 1 and December 31 in anticipation of the collection of taxes for 1907 then due and payable but not yet received; (c) Bonds issued during the year 1907 in anticipation of the collection of **uncollected taxes for 1906** then in arrears.

It may be said, however, of all these revenue bonds, that they were issued to provide, either directly or indirectly, funds required because of the necessity of making expenditures authorized by budget appropriations before the collection of the taxes levied to meet such expenditures. The bonds are **issued in anticipation of the collection** of such taxes, and are **payable out of the taxes when collected.** In view of the fact that obligations payable out of current revenues are not debts within the meaning of the constitutional limitation (p. 18 supra), it might be expected that revenue bonds issued to fund such obligations, which bonds are likewise payable out of current revenues when collected, should not be considered debts for this purpose. The status of the obligation represented by these bonds, with respect to the city's "existing indebtedness," is the subject of express constitutional provision as follows:

Redeemable from Taxes Levied

"This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes." * * *

Provisions of the Constitution

"All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes which are not retired within five years after their date of issue * * * shall be included in ascertaining the power of the city to become otherwise indebted."

The Record suggests that in the application of the above provisions to the revenue bonds outstanding on June 30, 1908 a distinction must be made between revenue bonds issued in the year of the tax levy, in anticipation of which they were issued, and revenue bonds issued in a year subsequent to the year of the tax levy, in anticipation of which they were issued, e. g., a distinction between revenue bonds issued in 1907, in anticipation of the taxes of 1907, and revenue bonds issued in 1907 in anticipation of the collection of uncollected taxes of 1906 or prior years. On the basis of this distinction the revenue bonds shown by the record (see p. 20, supra) may be grouped as follows:

Classification Suggested by Record

1	Bonds issued in anticipation of taxes for the year in which the bonds were issued	$94,539,776.92
2	Bonds issued in anticipation of uncollected taxes of a year prior to the year in which the bonds were issued	24,735,210.00
	Total	$119,274,986.92

It is generally agreed that the revenue bonds included in the first group above, to wit, "1, Bonds issued in anticipation of taxes for the year in which the bonds were issued," in the sum of ..... **$94,539,776.92 are to be excluded from the computation of the city's existing indebtedness in ascertaining the constitutional borrowing capacity.**

Revenue Bonds of Current Year Exempt

As to the revenue bonds included in the second group above, to wit, "2, Bonds issued in anticipation of uncollected taxes for years prior to the year in which the bonds were issued," in the sum of..... $24,735,210.00

Bonds against Arrears of Taxes

there exists a difference of opinion whether they should be included in or excluded from the computation of the city's "existing indebtedness" for this purpose.

It is submitted that for a proper determination of this question, it is necessary to **consider the nature of the obligation** represented by these bonds and the **development of the constitutional provision.**

The revenue bonds included in this second group differ from those included in the first group only in that they were issued against taxes in arrears at the time the bonds were issued. How little is that difference appears when it is considered that revenue bonds issued on December 28, 1907 in anticipation of uncollected taxes of 1907 would belong in the first group, whereas revenue bonds issued on January 2, 1908 in anticipation of uncollected taxes of 1907 would belong in the second group. If the latter bonds are to be considered debts within the meaning of the constitutional limitation, and the bonds issued a few days prior are not to be so computed, it will be seen at once that the comptroller who has absolute discretion in the issuing of revenue bonds, may, by selecting the date of issuing the bonds, decide whether they shall add to the city's debt and thereby decrease the borrowing capacity, or otherwise. It is submitted that no such result was intended by the framers of the Constitution, and unless it is imperatively demanded by the language of the constitutional provision, this result ought not to be reached by interpretation.

Nature of Obligation

That this result is not necessary to give effect to the constitutional provision is shown by a consideration of the development of the debt limitation. In the amendment of 1884, after fixing the limit of indebtedness and declaring that all indebtedness in excess thereof should be void, the Constitution provided:

Development of Provision Relating to Revenue Bonds

> "This section **shall not be construed to prevent the issuing** of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. * * *"

Amendment of 1884

This provision still remains in the Constitution. There is nothing in it that expressly eliminates the bonds therein

referred to **from the computation of the city's debt.** The provision is **that even if the city's debt has reached or exceeded its constitutional limit the city may, despite that fact, issue revenue bonds;** but **it is not provided that such revenue bonds after** being issued and while outstanding **should not be computed as a part of the "existing indebtedness"** of the city in determining the city's power to become indebted for other purposes.

Meaning

Despite the absence of any provision expressly exempting revenue bonds from the computation of the city's indebtedness it is submitted that such bonds would not have been included in the city's "existing indebtedness" even if the later amendment of 1895 had never been inserted in the Constitution. This proposition is based on the fact that revenue bonds are issued to provide funds required to meet either directly or indirectly obligations incurred pursuant to the annual appropriations and payable out of the annual revenues. If such obligations could be carried by the city and their payment delayed until the taxes were collected, they would not be included in the city's "existing indebtedness" under the well settled rule that such obligations being payable out of the taxes and revenues levied and provided for, do not fall within the class of obligations against which the constitutional provision is aimed, to-wit: obligations to be met and paid out of taxes to be levied in the future. The funding of these obligations by the issuing of short term revenue bonds, which in turn become payable out of taxes already levied, does not change the nature of the obligations. **They remain obligations which place no burden on future taxpayers and therefore are not debts within the meaning of the constitutional provision.**

Revenue Bonds not "Debts" despite Absence of Express Exemption

No Obligation on Future Taxpayers

It is submitted that this theory is not only consistent with the original debt limitation, adopted in 1884 and quoted above, permitting the issuing of revenue bonds in excess of the debt limit; but it is the only theory that makes clear the later provision with respect to revenue bonds in the amendment of 1895, which provides:

> "All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes which are not retired within five years after their date of issue * * * **shall be included in ascertaining the power of the city to become otherwise indebted."**

Amendment of 1895

Prior to 1895 All Revenue Bonds Exempt

It is submitted that this provision is founded upon the idea that **no outstanding revenue bonds were included in the debt prior to the enactment of this amendment**; and that such of those bonds as were **payable out of taxes which had remained unpaid for a period of five years or longer** were to be treated as involving a possible obligation to raise money for their redemption from sources other than the taxes against which they were originally issued, and ought therefore to be computed as part of the city debt.

Under this interpretation, it is not important whether the bonds were issued in the year of the tax levy, in anticipation of which they were issued, or in some later year. The determining question is **whether the bonds have been outstanding for a period of five years,** or are outstanding **against taxes levied more than five years from the date of inquiry.**

Since 1895 Revenue Bonds Outstanding for Period of Five Years Are Debt

This latter qualification, while not expressly suggested by the constitutional provision, is nevertheless necessary to give effect to its purpose. The Record shows that none of the revenue bonds outstanding on June 30, 1908 was issued for a longer period than three years; and it also shows that some of these bonds were issued as much as three years later than the year of the taxes out of which they are payable. If the constitutional provision be interpreted strictly and applied only to **revenue bonds outstanding five years from their date of issue,** its purpose might be defeated in practice by the issue of three year revenue bonds and refunding them by the issue of like bonds for a similar period, so that taxes more than five years overdue might be made the basis for exempt revenue bonds. This, it is submitted, was the very thing which the amendment of 1895 sought to prevent.

The good or bad policy of issuing revenue bonds against arrears of taxes is a matter of administration which does not affect the question now under consideration. It is submitted that the purpose of the constitutional debt limitation is secured by the above interpretation under which all revenue bonds redeemable out of taxes which at the date of the inquiry are overdue for a period of five years or more, are considered as "existing indebtedness" of the city.

Total Revenue Bonds Representing "Indebtedness"

Of the revenue bonds outstanding on June 30, 1908, as shown by the record, to wit,.....$119,274,986.92 only those redeemable from the tax levy of 1902, to wit, ...$100,000.00 were redeemable from taxes which at that time were overdue for a period of five years.

Total Revenue Bonds Exempt

It is therefore submitted that the balance, to wit: $119,-174,986.92 was not "existing indebtedness" of the city, within the meaning of the debt limitation, and therefore ought to be deducted from the total bonded debt shown by the Record.

This conclusion is in accord with the decision in Kronsbein vs. Rochester, 76 App. Div. 494 (1902), in which it was held that **revenue bonds outstanding against taxes overdue for a period of less than five years** should be deducted in computing the city's existing indebtedness, within the meaning of the constitutional debt limitation.

(i) Holdings of the Sinking Funds

On June 30, 1908, the following sinking funds were maintained by the City of New York under its Charter and ordinances (Record, p. 273):

Titles and Purposes of Funds

1 **The sinking fund of the City of New York,** created by Section 206 of the present Charter, for the redemption of corporate stock issued by the City of New York as now constituted for purposes other than for the supply of water.

2 **The water sinking fund of the City of New York,** created by Section 208 of the Charter, for the redemption of corporate stock issued by the City of New York as now constituted for the supply of water.

3 **The sinking fund for the redemption of city debt, No. 1,** created and maintained prior to 1898 by old New York City, for the redemption of consolidated stocks and bonds other than for the water supply.

4 **The sinking fund for the redemption of city debt, No. 2,** created and maintained by old New York City for the redemption of water bonds.

5 **The sinking fund of the City of Brooklyn,** maintained by Brooklyn for the redemption of bonds other than for water supply.

6 **The water sinking fund of the City of Brooklyn** maintained by Brooklyn for the redemption of water bonds.

7 **The sinking fund of Long Island City** for the redemption of revenue bonds.

8 **The sinking fund of Long Island City** for the redemption **of water bonds.**

9 **The sinking fund of Long Island City** for the redemption of fire bonds.

Besides the above funds, all of which were maintained for the **redemption of outstanding bonds,** there was another sinking fund of the City of New York, which was created and maintained by New York City prior to 1898 for the payment of interest on certain city bonds.

Funds Continued by Charter

The several funds maintained prior to January 1, 1898 by cities now forming a part of the City of New York were continued by the Charter of the Greater City, under the provisions of Sections 204, 207, 208 and 209, in which it is provided that these funds, their accumulations, and revenues shall be administered in the manner and for the purposes provided by the laws theretofore applicable to them.

Pledge of Funds to Redemption of City Debt

All the sinking funds maintained by the City of New York on June 30, 1908, whether newly created by the existing Charter or by it continued as previously existing, except only the fund for the payment of interest on the city debt, are pledged to the redemption of the bonds payable from the several funds respectively. This pledge takes the form of a contract between the city and its bondholders. The Charter re-enacting previous laws provides in

Provision of City Charter

> Section 211: "Between the city and its creditors and holders of its stocks and bonds as aforesaid, including the bonds and stocks of municipal or public corporations or parts thereof consolidated, * * * there shall be and there is hereby declared to be a contract that the funds and revenues of the city, including all the corporations last stated * * * shall be accumulated and applied only to the purposes of the said several sinking funds as prescribed by law, until all said debt redeemable therefrom is fully redeemed and paid as herein provided."

And to the same effect see, Section 212 of the Charter.

Under these provisions it is plain that moneys once paid into the above sinking funds, in accordance with the provisions of laws relating thereto, cannot be diverted from the purposes to which the funds are respectively pledged. The contractual effect of this pledge has been recognized in a particular manner by the legislation respecting the excess revenues of the sinking fund for the redemption of city debt No. 1. This fund exists for the amortization of bonds of the old City of New York issued prior to January 1, 1898. The amount of bonds payable from this fund could not **increase** after January 1, 1898 because the old city was on that date deprived of the power to issue any further bonds, and bonds issued by the new city were made payable from the new sinking funds of the City of New York. In fact, the amount of bonds payable from this old fund for the redemption of the city debt decreased steadily by reason of the maturity and redemption of bonds payable from it. Meanwhile its revenues pledged to it by special laws and secured to it by Sections 211 and 212 of the Charter increased rapidly. The result was that in a few years this fund accumulated a large and constantly growing surplus. Despite the fact that its revenues and accumulations were greatly in excess of its needs to amortize bonds payable from it, the pledge of its assets and revenues to the redemption of such bonds was considered of such binding force that it required an amendment to the Charter enacted by the Legislature in 1903 and now forming Section 222 of the Charter to relieve the fund of its excess accumulations and revenues. This amendment provided that the commissioners of the sinking fund should annually set apart a sum sufficient to provide for the amortization of the bonds payable from this particular sinking fund, and authorized the investment of the excess in general fund bonds of the city. This investment in general fund bonds is effected by transferring such excess to the general fund of the city for the reduction of taxation and receiving an equivalent amount of city bonds which thereupon become the property of the fund and are held by it to be used if necessary for the redemption of the bonds payable from it. The resort by the Legislature to this highly artificial and fictitious method of avoiding any seeming breach of the city's contract to maintain the pledge

Nature of Pledge of Funds

Effect of Pledge Illustrated by Issue of General Fund Bonds

of the sinking fund holdings to the purposes for which they were respectively created is an emphatic admission and declaration of the lack of power to divert these funds from their original purposes. Indeed, it is not too much to say that any act of the State Legislature authorizing the diversion of these funds would be void as an impairment of the obligation of contract within the provisions of the United States Constitution.

On June 30, 1908, the several sinking funds above mentioned held city bonds, mortgages of real estate, and cash as shown in the following table entitled "Condensed Summary of Sinking Fund Holdings":

CONDENSED SUMMARY OF SINKING FUND HOLDINGS

JUNE 30, 1908

(Record pp. 272–285 Incl.)

Nature of Holdings	Total	Sinking fund of the City of New York	Water sinking fund of the City of New York	Sinking fund for the redemption of the city debt No. 1	Sinking fund for the redemption of the city debt No. 2	Sinking fund of the City of Brooklyn	Water sinking fund of the City of Brooklyn	Sinking fund of Long Island City for the redemption of revenue bonds	Sinking fund of Long Island City for the redemption of water bonds	Sinking fund of Long Island City for the redemption of fire bonds
Rapid transit dock and bridge bonds	$31,634,495.72	$1,800,050.00	$1,100,000.00	$27,584,371.38	$379,074.34	$691,000.00	$75,000.00		$5,000.00	
Bonds for various other municipal purposes	80,375,881.68	10,864,892.84	2,000,770.05	58,534,443.48	625,709.67	6,617,678.00	1,714,387.64		2,000.00	$16,000.00
	$112,010,377.40	$12,664,942.84	$3,100,770.05	$86,118,814.86	$1,004,784.01	$7,308,678.00	$1,789,387.64		$7,000.00	$16,000.00
Water bonds:										
Issued prior to January 1, 1904	13,874,239.50	295,000.00	1,601,000.00	4,058,344.74	6,073,500.00	976,394.76	851,000.00	19,000.00		
Issued subsequent to January 1, 1904	6,662,498.26	2,638,685.76	226,000.00	2,536,500.00	423,000.00	275,812.50	522,500.00	36,000.00	4,000.00	
Assessment bonds	9,582,548.86	3,358,242.42	361,609.49	3,900,981.65	95,341.20	1,713,374.10	150,000.00	3,000.00		
General fund bonds	54,250,000.00			54,250,000.00						
Special revenue bonds	1,725,000.00		125,000.00	1,150,000.00	150,000.00	300,000.00				
TOTAL BONDS	$198,104,664.02	$18,956,871.02	$5,414,379.54	$152,014,641.25	$7,746,625.21	$10,574,259.36	$3,312,887.64	$58,000.00	$11,000.00	$16,000.00
Mortgages on east side park lands	64,680.00					64,680.00				
Cash (applicable to bond redemption)	4,237,927.70	437,548.45	114,246.52	1,851,952.20	638,128.89	120,393.79	1,051,943.80	18,540.19	2,495.97	2,677.89
Total Holdings	$202,407,271.72									
Installments provided for in 1908 budget but not paid into sinking funds June 30, 1908	5,531,864.02	4,088,768.34	1,043,385.30			397,593.71			950.00	1,166.67

Note: On June 30, 1908, the sinking fund for the payment of interest on the city debt held $250,000 of special revenue bonds of 1907.

(Record, pp. 260, 261)

All the bonds held by the sinking funds, as above shown, are included in plaintiff's Exhibit A, as a part of the bonded debt of the City of New York, outstanding on June 30, 1908. Moreover, each of these funds, except that for the payment of interest, was held for the redemption of some portion of the bonded debt of the City of New York. The question arises, what part of the holdings of the sinking funds is to be deducted from the total bonded indebtedness of the city?

Are Sinking Fund Holdings an Offset to City Debt?

In the case of Bank vs. Grace, 102 N. Y. 313 (1886), it was decided that city bonds which have been purchased with funds of and are held by the city's sinking funds, are no longer to be considered "existing indebtedness" in determining the right of the city to become further indebted.

Bonds in Funds not "Debts"

The theory upon which this conclusion was based seems to be that it is the fact of ownership by the city of its evidences of indebtedness that justifies their deduction in determining the "existing indebtedness." The result reached by the case may, however, be supported by either of two interpretations of the words "existing indebtedness," as applied to the holdings of the sinking funds, which may be stated as follows:

Theory of Bank vs. Grace

1 A city bond is a city debt until actually redeemed. This is true, irrespective of the power of the city to make payment, or the possession by the city of assets out of which payment is to be made; but a bond which has been actually purchased by the city with its funds may be treated as substantially redeemed and as no longer constituting an indebtedness within the meaning of the Constitution.

2 The sinking funds and all their revenues and assets are expressly and irrevocably pledged to the redemption of the city's bonded debt. The value of such holdings of whatever nature may therefore be treated as an offset to the debt for the redemption of which they are pledged.

Under the first interpretation, the bonded debt of the city may be decreased by the amount of such bonded debt held by the several sinking funds. Under the second, the bonded debt may be decreased by the amount of the total value of the assets of the sinking funds maintained for the redemption of the bonded debt.

"Exempt" and "Non-exempt" Bonds

In this connection it is important to notice that a part of the bonded debt of the city is not computed in determining the "existing indebtedness," within the meaning of the Constitution. Such bonds are hereinafter referred to as "exempt bonds" as contrasted with "non-exempt bonds," or those which are computed as a part of the "existing indebtedness." Moreover, it is important to notice that some of the above mentioned sinking funds hold bonds and other assets pledged to the redemption of these exempt bonds. This complication did not exist when the case of Bank vs. Grace was decided.

Application of First Interpretation to Exempt and Non-exempt Bonds

The difference between the two interpretations of the principle under which deductions of sinking fund holdings are made from the total bonded debt is as follows: The first has regard to the **form of the assets** in the sinking fund. If those assets are **bonds**, they should be deducted unless the bonds are **exempt bonds**, in which case never having been considered a part of the "existing indebtedness," or having been deducted from the total bonded debt **because exempt**, they ought not to be deducted again **because held by the sinking fund. Under the first interpretation the important question with reference to deducting a sinking fund holding, is this: Is the asset in question a bond? If so, is it an exempt or a non-exempt bond? If exempt, it ought not to be deducted. If non-exempt, it ought to be deducted; and it makes no difference whether the fund by which it is held exists for the redemption of exempt bonds, non-exempt bonds, or other obligations.**

Second Interpretation

The second interpretation has regard to the purpose for which the fund is pledged. If pledged to the redemption of exempt debt, its assets should not be deducted no matter what their form. If pledged to the redemption of non-exempt debt, its assets ought to be deducted whether those assets consist of exempt bonds, non-exempt bonds or other value.

Deduction under First Interpretation

If the first interpretation be adopted as controlling this question, then all city bonds held by the sinking funds, to wit: $198,354,664.02 are to be treated as no longer representing debts of the city.

In so far as the bonds held by the fund are non-exempt bonds, they are to be treated as reducing the outstanding non-exempt debt; and in so far as they represent exempt bonds, they are to be treated as reducing the exempt debt. The result, if this theory be applied consistently, would be that special revenue bonds in the sum of $250,000, held by the fund for the payment of interest, would be deducted from the bonded debt in ascertaining the existing indebtedness, for they are non-exempt bonds held by a sinking fund. On the other hand, exempt water bonds held by the various funds in the sum of .....$6,662,198.26 would not be deducted from the total bonded debt in ascertaining the existing indebtedness because their presence in the funds under this view simply reduces the already exempt debt.

Results of First Interpretation not Satisfactory

It is submitted that it would be absurd under any theory to deduct the special revenue bonds held by the fund for the payment of interest. And it seems equally improper not to deduct such of the $6,662,498.26 exempt water bonds as are held by funds pledged to the redemption of non-exempt debt. Though these bonds are themselves exempt, yet the value represented by them is pledged to and will be applied to the redemption of non-exempt debt. The amount of such bonds held for the redemption of non-exempt debt ought therefore to be treated as an offset to such non-exempt debt, and as such, deducted from its total. As suggested above, this result cannot be obtained under the first interpretation of the principle under which deductions are made which regards such holdings merely as reducing the exempt debt.

In Some Cases Absurd

On the other hand, since under this view all non-exempt bonds held by the sinking funds would be deducted, it would follow that certain non-exempt bonds in the sinking fund for the redemption of city debt No. 1 held for the redemption of bonds now exempt, to wit, county bonds, together with non-exempt bonds held by the water sinking fund for the redemption of exempt water debt, would likewise be deducted from the gross bonded indebtedness.

Sinking Funds for Redemption of Exempt Debt

It is manifestly improper to consider as an offset to the city's existing indebtedness such **non-exempt bonds held by the sinking funds for the redemption of exempt bonds.** These exempt bonds are not indebtedness of the city, within the meaning of the constitutional provision, and neither their amount, their maturity, nor their redemption affects the question of the city's power to become indebted. Sinking fund provision for such bonds may reduce the amount of the city's exempt debt, but can in no sense lessen the city's "existing indebtedness," i. e., its non-exempt debt.

Should not Be Deducted

Not only is this the logical legal conclusion, but it is also the necessary result of the business situation; for if the city debt be computed to-day, omitting water bonds and other bonds not to be included for this purpose, and deducting the amounts held by the sinking funds including, let it be supposed, the sum of $5,000,000 in a sinking fund for the redemption of exempt water bonds, the $5,000,000 of borrowing capacity given by this latter deduction would be wholly fictitious. If the water bonds fell due to-morrow and the $5,000,000 were paid at once to redeem them, such payment would not reduce the city's "indebtedness" as here understood; but it would reduce the sinking fund holdings by the amount of $5,000,000, and the result would be that there being $5,000,000 less in the sinking fund, the "indebtedness" would be increased to that extent.

Effect of Deduction of Funds Held for Exempt Debt Illustrated

It is submitted, therefore, that the **holdings of sinking funds for the redemption of exempt debt,** to wit:

Amount of Holdings for Exempt Debt

Holdings of the water sinking fund of the City of New York for the redemption of water bonds, issued after Jan. 1, 1904 (Record, pp. 315-316)	$357,228.18
Less estimated amount thereof applicable to $8,261,308.55 debt incurred prior to Jan. 1, 1904, not exempt (See p. 25)	223,223.37
	$134,004.81
Holdings of the sinking fund for the redemption of city debt No. 1 for the redemption of exempt New York County bonds (estimated)	$6,000,000.00
Total	$6,134,004.81

should not be deducted from the city's bonded debt on June 30, 1908, for the purpose of ascertaining its "existing indebtedness."

This conclusion being inconsistent with the first interpretation, in that the question of deduction of sinking fund holdings is decided not by the **form of the assets,** but by the **purpose** for which they are pledged, **it is suggested that that interpretation is too narrow to meet the holdings and purposes of the sinking funds and their relation to the city's exempt and non-exempt debt.**

First Interpretation Inconsistent with above Conclusion

And it is further suggested that the second interpretation, which regards the purpose for which the sinking funds exist, and considers their appropriation to the redemption of existing bonded debt as constituting an offset to that debt, furnishes a satisfactory rule upon which to decide the question arising out of the relation between the sinking funds and the existing indebtedness referred to by the Constitution.

The Second Interpretation the Proper Basis for Sinking Fund Deduction

The decision in Bank vs. Grace, supra, does not preclude the adoption of this theory as a basis for the deduction of sinking fund holdings. That case decided merely that bonds held by the funds are no longer "existing indebtedness." At the time of that decision there were no exempt bonds and no funds held for the redemption of exempt bonds, and the question of cash in the funds was not raised by the pleadings or passed upon by the court.

Effect of Decision in Bank vs. Grace

Whatever the theory upon which deductions of sinking fund holdings are to be justified, it must be regarded as settled in this state that bonds held by the funds for redemption of non-exempt debt shall be deducted. On this point the case of Bank vs. Grace, supra, has been cited and approved in other states:

Bonds To Be Deducted

Brooks vs. Philadelphia, 162 Pa. 123 (1894)
Kelly vs. Minneapolis, 63 Minn. 125 (1895)

On the **question of the deduction of cash in a sinking fund,** there is some conflict of opinion, but in no case where the point was squarely at issue has the decision been against the deduction. In Bank vs. Grace, supra, the question did not arise and no mention was made of it. In the Pennsyl-

Shall Cash in Funds Be Deducted

vania case of Brooks vs. Philadelphia, supra, which is frequently cited as authority for the proposition that cash should not be deducted, the court said:

Dictum of Pennsylvania Court

> "There are besides these (the city's bonds) other securities than those of the city in the fund. As of these last, obviously they remain in the fund bound by the inviolable pledge which attached to them when they first became part of it. So far as concerns them they have not yet been applied in payment or redemption of any part of the funded debt. An asset of the city easily convertible into cash, they undoubtedly are, but as yet they have not operated to the reduction of the funded debt to which purpose they were pledged. In effect they only represent savings of the city set aside in anticipation of the payment of the debt; as to any actual reduction of the debt by them there has been none; the debt is still an outstanding liability unaffected by the savings with only an increased ability on the part of the city to pay; an increase in ability measured by the cash value of the savings. When issued in the purchase of the debt, there is a release of the pledge and a discharge of the obligation to the amount of the purchase."

This was dictum merely. It was not necessary to the decision of the issue before the court. The issue involved was disposed of when the court decided that city bonds in the sinking fund were not to be included as a part of the city's debt.

Decisions in Other States

In the following cases **cash in the sinking funds was deducted** in arriving at the city's existing indebtedness for the purpose of determining its power to become further indebted under constitutional limitations of municipal indebtedness similar to the provision in New York:

> Stone vs. Chicago, 207 Ill. 492 (1904)
> Kelly vs. Minneapolis, 63 Minn. 25 (1895)
> Williamson vs. Aldrich, 108 N. W. Rep. 1063 (S. D. 1906)

In the latter case the court said:

> "As no contingency will arise that can possibly justify the diversion of any part of the $38,000 now in the sinking fund to a purpose other than the pro tanto

diminution of specific indebtedness included in estimating the aggregate liability of the city, **there is a clear distinction between such an obligation and the indebtedness of an individual who may or may not pay what he owes and consequently his available assets are not to be considered in computing the amount of his actual indebtedness.** It being quite apparent that the primary object of the act restricting such public indebtedness to 5% of the assessed valuation of taxable property was to protect the taxpayer and prevent improvident officers from impairing municipal credit, it seems reasonable to infer that the framers of the Constitution placed the limitation on actual municipal indebtedness for the payment of which taxes must be levied in the future and not upon apparent indebtedness for the payment of which money has been collected in the sinking funds. It therefore follows that in estimating the authorized indebtedness of the city the amount in the hands of the treasurer belonging to the sinking fund and applicable only to the payment of specific debts should be deducted from the aggregate indebtedness of the city, and in construing similar provisions it has been so held in numerous cases."

Distinction between Cash in Sinking Fund and Cash of Individual Debtor

This case satisfactorily disposes of the favorite argument against the deduction of cash, to wit, that a debt is none the less a debt because the debtor possesses assets out of which he might pay it. In the case of the sinking funds, the cash is irrevocably appropriated and pledged to the redemption of existing debt, and it cannot be diverted from that purpose. The cash of an individual debtor is more nearly analogous to cash in funds which may or may not be used to liquidate debts payable from said funds, **but these are not sinking funds.**

In support of the above conclusion, the South Dakota court cited the New York case of Kronsbein vs. Rochester, 76 App. Div. 494 (1902), in which it was said:

Decision of New York Courts

> "Included among the cash resources of the city are several distinct funds aggregating nearly $600,000. . . These funds are set apart pursuant to statutory authority in each instance and as a rule to meet some lingering specific indebtedness against the city. **If a fund is to be used to reduce the principal of a distinct existing**

liability of the city, we think to that extent **it should be deducted** in estimating the city's liabilities. The outstanding liability toward the payment of which the fund is to be applied in any given case is included among the debts of the city for the purpose of ascertaining if it has reached its debt limit. **The sinking fund,** therefore, which is to be used in diminishing it **should be credited** to the city upon the other side of the ledger. We realize that when the indebtedness of an individual is mentioned, the sum of his obligation, irrespective of the value of his assets, is intended. **The individual may use his assets for any purpose he sees fit. The officials of the city entrusted with the control and application of a fund created for a definite purpose are charged with the duty of using it only for that purpose.** A sinking fund invested solely for the purpose of paying water bonds must not be diverted for the payment of the salaries of officials of the city. **It is to be used to reduce that particular debt which it came into existence to deplete and hence in fact will lessen that liability to the full extent of the funds.** * * * * * * * * We apprehend, however, this construction will not obtain where the cash resources may be used for any legitimate purpose whether the obligation be already incurred or to be hereafter contracted. To illustrate, there is a fund among the cash resources denominated the local improvement fund. This money may be used for any local improvements as there is no restriction upon its application by the municipality. A sum on hand to be devoted to general purposes in that way ought not to be deducted from the liability of the city in estimating its indebtedness, for it may not in fact be used to reduce the sum. Therein we conceive lies the distinction."

Rule of Kronsbein vs. Rochester

It is submitted that the Kronsbein case has hit upon the proper distinction. If funds in the city treasury are applicable to any of the several liabilities, some of which are not computed as parts of the city debt, then such funds ought not to be deducted; but if such funds are expressly and irrevocably pledged or appropriated to the payment and redemption of specific debt included in the outstanding indebtedness of the city they ought to be deducted.

It is probably impossible to find in any jurisdiction a more emphatic pledge of the sinking funds, their holdings and revenues to the redemption of bonded indebtedness than that which exists in the laws applicable to the City of New York. Every dollar of value in the city's sinking funds, except that for the payment of interest on city debt, is irrevocably pledged and appropriated to and cannot be diverted from that purpose, except only that the excess accumulations and revenues of the sinking fund for the redemption of city debt No. 1 may be invested in general fund bonds. As to all the cash in the sinking fund: The commissioners have the power, and it is their duty to invest cash in city bonds. If and when it is so invested there can be no doubt that the bonds so purchased should be deducted in computing the "existing indebtedness." Under general principles, a court of equity will consider as done that which ought to have been done, and since the commissioners may and ought to invest this cash in the city's bonds the court ought to hold that the cash will be considered as having been applied to the redemption of the debt and will hold that the debt has been diminished to the extent of the said cash.

Cash Pledged to Redemption of Debt

The cash in the sinking funds which should be deducted in computing the "existing indebtedness" should not include cash in the fund for the payment of interest on the city debt or excess cash in the sinking fund for the redemption of city debt, No. 1, because such cash is not set apart for the redemption of existing debt.

Cash To Be Deducted

The principles above stated apply with equal force to the mortgages on real estate held by the sinking fund. The value represented by these mortgages is pledged and appropriated to and will eventually be applied to the redemption of the city's non-exempt bonded debt and ought, therefore, to be treated as an offset thereto.

Mortgages

In conclusion, it is respectfully submitted that sinking funds and their total accumulations **pledged to the redemption of non-exempt debt** included in Exhibit A should be deducted from the total bonded debt on June 30, 1908 in computing the city's "existing indebtedness" on that date. The amount of this deduction may vary in accordance with the decision as to what debt is exempt; but on the basis that

Summary of Sinking Fund Holdings To Be Deducted

only the debts expressly declared by the Constitution to be exempt will be so held by the courts, the deduction for sinking fund holdings should be as follows:

Total holdings of all sinking funds for redemption of bonded debt:

Bonds		$198,104,664.02
Mortgages on real estate		64,680.00
Cash (applicable to redemption)		4,237,927.70
Total		$202,407,271.72
Less estimated amount held for redemption of exempt county bonds	$6,000,000.00	
Less also the amount held for the redemption of exempt water debt	134,004.81	
		$6,134,004.81
		$196,273,266.91

(j) Effect of Available Budget Appropriations for Redemption of Bonded Debt

The budget which, under Section 226 of the Charter, became effective on January 1, 1908, contained appropriations of the revenues of that year for the redemption of the city's bonded debt as follows:

1908 Appropriation for Redemption of Bonds

1 Redemption of bonds maturing in 1908 for which no sinking fund provision existed and which were therefore payable from the taxes direct (Record, p. 264; Ex. AA) $9,767,161.67

2 Annual instalments due the sinking funds for redemption of the bonded debt (Record, p. 272) $6,111,088.62

Balances of Appropriations June 30, 1908

Prior to June 30, 1908, part of these appropriations had been applied to their respective purposes (Record, pp. 264-269). On that date, however, there were balances of said appropriation not yet applied, as follows:

1 Redemption of bonds (maturing between July 1 and December 31, 1908)		
(a) Special revenue bonds issued in 1907		$2,890,000.00
(b) Bonds of "constituent corporations" consolidated in the present city		820,825.47
Total		$3,710,825.47
2 Sinking fund instalments.. (Record, p. 273)	$5,531,864.02	
Less amount thereof applicable to exempt water debt (p. 44 supra)	276,123.06	
		5,255,740.96

Both the above sums, making a total of...$8,966,566.43 were payable from the revenues of 1908 and were specifically set aside and appropriated from those revenues for the redemption, either directly or through sinking funds, of bonds which on June 30 formed a part of the city's bonded debt.

Appropriation Removes Burden from Future Taxpayers

In the case of the bonds payable directly from taxation, the indebtedness represented by them was provided for in the current revenues just as ordinary liabilities payable from appropriation accounts are provided for. These bonds were outstanding evidences of the city's indebtedness, but that indebtedness needed only to mature in order to be satisfied and discharged. The funds for its discharge were provided by the appropriations which could be used only for that purpose.

Amount To Be Deducted

It is, therefore, submitted that these bonds did not represent "existing indebtedness" of the city on June 30, 1908, and that therefore the bonded debt of the city

as of that date should be reduced by the above sum of .....$3,710,825.47 applicable to the redemption of such bonds.

Appropriations to Sinking Funds

As to the instalments due the sinking funds, it is submitted that **if the cash in the funds is to be treated as an offset to the existing debt,** as suggested above, then these appropriations provided for and payable to the sinking funds, but not yet actually paid into them, should be treated likewise.

In connection with both classes of these available budget appropriations, it is suggested that the purpose of the constitutional limitation of the city's debt is to **prevent the present generation incurring excessive indebtedness payable in the future.** It is not a limitation on the expenditures of the city. It does not limit the taxing power or the power to incur **obligations payable from taxation levied in the present.**

Effect of Appropriations

To the extent of the above appropriations, the present generation had provided for the retirement of bonded debt outstanding June 30. To that extent the taxpayers of future years were relieved from responsibility, and it is therefore respectfully submitted that in computing the "existing indebtedness" of the city, for the purpose of ascertaining its power to become further indebted, the bonded debt as of June 30, 1908 should be regarded as decreased to the extent of these available balances in the above appropriations. The total balance on that date was....$8,966,566.43

In support of this conclusion we cite Bank vs. Grace, above, in which Judge Danforth said:

> **"We think it plain that the indebtedness here referred to (in the constitution) is an indebtedness to be met in the future by taxation."**

The bonded debt as of June 30 was not an indebtedness **to be met in the future** in so far as it had been provided for in the budget of 1908.

Under this heading it is intended to group all contracts which on June 30, 1908 constituted binding obligations of the City of New York entered into by the various departments and officials of the city, for the construction and establishment of public improvements, **the cost of which had been provided for, not by an appropriation of current revenues,** but by an **"authorization" of the issue of city bonds** (other than revenue bonds in anticipation of taxes).

Contracts Payable from Bond Authorizations

This "authorization" of bonds to provide for the cost of a public improvement is made at the time that the proper department or official is authorized to enter into contracts for the improvement, and such contracts when registered by the comptroller become a charge against this authorization, in pursuance of the provisions of Sec. 149 of the Charter. **Each "authorization" becomes a "bond fund" or "bond account" on the books of the department of finance.** Since the construction of a single improvement may involve the letting of more than one contract, it frequently happens that there are several contracts registered against the same fund.

"Bond Funds"

Exhibit I being a "summary of bond accounts, June 30, 1908," shows unpaid contract liability registered against bond funds then existing, as follows:

Corporate stock funds for various municipal purposes (Ex. I, pp. 56, 64)	$35,924,502.67	
Corporate stock funds for the New York Public Library (Ex. I, pp. 41, 56, 64)	3,479,511.85	
Corporate stock funds for rapid transit purposes (Ex. I, pp. 63, 64)	7,899,023.91	
Corporate stock funds to provide for the supply of water prior to Jan. 1, 1904) (Ex. I, pp. 57, 58, 61, 64)	45,881.53	Summary Gross Contract Liability
Special revenue bond funds (Ex. I, pp. 64, 124)	347,265.48	
Assessment bond funds (Ex. I, pp. 62, 63, 64)	6,294,599.22	
Old Borough funds (Ex. I, pp. 64, 125, 126)	14,421.21	
Corporate stock funds to provide for the supply of water (subsequent to Jan. 1, 1904) (Ex. I, p. 61)	22,708,483.36	
Total (Ex. I, p. 64)	$76,713,689.43	

So much of the above contract liability as represents contracts made subsequent to Jan. 1, 1904 for the supply of water, is expressly exempted from the computation of the city's "existing indebtedness" (see p. 23 supra).

Contracts for Water Supply Exempt

Query as to Contracts for High Pressure System

The question is raised here, as above (p. 25), whether contract liability incurred on account of the high pressure system was incurred for the supply of water, within the meaning of the Constitution. Exhibit I (p. 57) shows the amount of the contract liability on account of high pressure system, as—$677,038.93.

Registered Contract Liability other than Water

The total unpaid registered contract liability on June 30, 1908, after deducting the above contracts on account of the water supply, was either

(1) If high pressure contracts be deducted because made for the "supply of water" $54,005,206.07

or

(2) If high pressure contracts be not deducted because not for the "supply of water" $54,682,245.00

Contracts Filed but not Registered

In addition to the above registered contracts, there were contracts duly awarded by heads of departments, executed by the city and the contractor and **filed** with the comptroller for registration, in accordance with Section 149 of the Charter, prior to June 30, 1908, **but not then registered,** in the amount of (Record, pp. 18 and 334) $3,690,000.00

Contracts Awarded but not Filed

It is suggested that there were probably other contracts awarded by the departments and binding upon the city as contracts, but not yet filed with the comptroller for registration. The Record, however, contains no information as to such contracts.

Amount Due and Payable on Contracts

There is on the Record evidence purporting to show the **amounts actually earned by contractors prior to June 30, 1908** and unpaid on that date, on account of the above mentioned registered contracts. On this account the Record shows the sum of (Record, pp. 301, 302) $2,553,933.92

Insufficiency of Evidence of Amount Due

Before considering the purpose of this evidence, it is suggested that, if important, it must be supplemented. It includes amounts due on account of contracts for the water supply which are exempt, and it does not include amounts earned previous to June 30, 1908 and retained by the city,

that is, the retained percentages on previous payments. In fact, this sum represents simply the amount of unpaid vouchers in the comptroller's office on June 30 chargeable to bond accounts.

Is Contract Liability a Debt before Payment Becomes Due?

This testimony purporting to show the amount actually due on contracts raises the question, whether the city upon formally entering into a contract becomes indebted at once for the full cost of the work contracted for; or whether the city's indebtedness arises only when and to the extent that payments on account of the contract are earned by and due to the contractor. The Constitution provides that no city "shall be allowed to **become indebted for any purposes, or in any manner** to an extent which, including existing indebtedness, shall exceed," etc.

With reference to the interpretation of this provision and its application to the obligations of the contracts above mentioned, the question arises, when does the city become indebted, and what is its "existing indebtedness," within the meaning of the constitutional provision?

Interpretation of Constitutional Provision

These questions must be determined in the light of the **purpose** of the constitutional limitation of city indebtedness, to wit, the protection of **future taxpayers** from the burden of liquidating excessive obligations incurred by the **voters of the present** and their representatives.

Obligation of Contract

By entering into a contract for a public improvement the city undoubtedly assumes an obligation. The liability to make payment on account of this obligation is contingent upon the performance by the contractor of the consideration for the city's obligation. Ordinarily this contingent obligation would not be considered a debt; but **the question here is whether it is an "indebtedness," within the purpose and meaning of the constitutional debt limitation.**

Decisions in Other States

In Springfield vs. Edwards, 84 Ill. 626 (1877) the court said:

> "If a contract or undertaking contemplates in any contingency a liability to pay when the contingency occurs, the liability is absolute—the debt exists—and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred."

In Culberson vs. Fulton, 127 Ill. 30 (1888) it was held that:

> "**By entering into the contract on August 15, 1887, the city 'became indebted.'** The obligations entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the constitution. It cannot be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed and could be compelled to do so if the work should be done according to the contract."

The above cases are cited and approved in:

Chicago vs. McDonald, 176 Ill. 404 (1898)
East Moline vs. Pope, 224 Ill. 386 (1906)
Schnell vs. City of Rock Island, 232 Ill. 89 (1908)

Similar conclusions were reached in other jurisdictions in the following cases:

French vs. Burlington, 42 Iowa 614 (1876)
Cedar Rapids vs. Bechtel, 81 N. W. 468 (1900)
Addyston Pipe & Steel Co. vs. Corry, 197 Pa. 41 (1900)
Spilman vs. Parkersburg, 35 W. Va. 605 (1891)

In Sacket vs. New Albany, 88 Ind. 473-479 (1883), the court said:

> "By indebtedness in this connection we mean an agreement of some kind by the city to pay money when no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement."

In Ramsey vs. Shelbyville, 83 S. W. 116 (Ky. 1904) it is said:

> "An obligation payable in future is no less a debt within the meaning of the provision than if payable at once."

In Windsor vs. Des Moines, 81 N. W. 476 (1900), where the validity of a contract for the construction of a lighting plant was in question, it was said:

> "Again it is argued that the contract does not create a debt but merely a contractual obligation which could only become a debt as the light was furnished and the compensation earned. * * * But where the contract is for the erection of electric light plants or

> for any other improvement, and the time of payment is postponed to a later date, and no special levy for the purpose of erecting such works is authorized, the rule seems to be well settled that the sums to become due in the future must be taken into account in estimating the amount of the existing indebtedness of the municipality. * * * This must be the true rule, for if appellant's contention be correct a city might, by contracts such as the one in suit, absorb all the general revenues in advance and leave nothing for the payment of current expenses. Suppose a city should anticipate all its general revenues and thus leave nothing for the payment of current expenses; and suppose further, that it should issue warrants for the payment of these expenses which were not paid for want of funds, could not the holder of these warrants enforce them against the city, **and if enforced and the city is compelled to pay** (as no doubt it would be obliged to do), the amount thereof in addition to the amounts previously appropriated for improvements, **would not the very object of the constitutional provision be thwarted and a wise provision of our fundamental law rendered nugatory?"**

In the case of Litchfield vs. Ballou, 114 U. S. 190 (1885), the United States Supreme Court said:

> "The language of the Constitution (of Illinois) is that no city 'shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding five percentum on the value of its taxable property.' It shall not become **indebted,** it shall not incur any pecunary liability, it shall not do this in any manner, neither by bonds nor notes, nor expressed or implied promises, nor shall it be done for any purpose no matter how urgent, how useful, how unanimous the wish."

Decision of U. S. Supreme Court

In Lobdell vs. Chicago, 227 Ill. 218 (1907), which is typical of a line of cases in which the obligation of ingenious contracts calculated to avoid the constitutional debt limitation has been considered by the courts, it is held that any obligation which **requires the city to raise money in the future,** or in any way pledges or mortgages property belonging to the city to secure payment of such obligation, is a debt.

In the case of Cedar Rapids vs. Bechtel, above, it was held that a debt was incurred when the contract for an improvement was made, and if at that time the city's debt was

within the constitutional limit, bonds to provide funds to make payments on account of the contract might be issued, despite the fact that at the time of the issuing of the bonds the city's indebtedness was in excess of its limit. This is an emphatic decision that the validity of the indebtedness, within the constitutional provision, depends upon the condition of the city's finances at the time the contract was made.

Decisions of New York Courts

The **decisions and dicta of the New York Courts** on this subject follow the cases cited above. In Smith vs. Newburg, 77 N. Y. 130 (1879), the court considered a contract of lease under which the city agreed to pay the rental annually, with reference to a statutory restriction on the city's power to incur indebtedness for the purposes for which the lease was made. It was held that:

> "The whole liability was incurred upon the execution of the lease."

The court distinguished the earlier case of Weston vs. Syracuse, 17 N. Y. 110 (1858), which was cited as authority for the proposition that no indebtedness arises under a contract until payment thereon is due, on the ground that the Syracuse case was decided upon the peculiar phraseology of the Charter provision there involved.

In the matter of Rapid Transit Commissioners, 5 App. Div. 290, the court said, with reference to the effect of the constitutional debt limitation upon the obligation of a contract for a public improvement:

> "The obligation is created at the time of the original contract; * * * hence it comes within the prohibition of the Constitution."

In the matter of Rapid Transit Commissioners, 23 App. Div. 472, it was said:

> "It is stated in the report of the Supreme Court Commissioners that the suggestion that no contract for the construction of the road can be made without ipso facto creating a debt to the full extent of its estimated cost is not reasonable. The question of the reasonableness of a constitutional inhibition is not open to discussion, **and an examination of the authorities in this state upon the question of what constitutes indebtedness** or debts due, may show that this unreasonable proposition has very respectable authority, viz, our Court of Appeals."

From other expressions in the above opinions in the rapid transit cases it is evident that the court was of the opinion **that a contract for the construction of the rapid transit railways would constitute an indebtedness** within the meaning of the constitutional limitation of the city debt.

It is submitted that **under the above authorities the obligation incurred by the city upon entering into a contract** for a public improvement, for the payment of which provision has been made, not by an appropriation of current revenues, but by an authorization of the issue of city bonds, (other than revenue bonds), **is an "indebtedness" within the meaning of the constitutional provision** under consideration; that immediately upon entering into such a contract the city "becomes indebted" to the full extent of the contract price; that such contract is void if, at the time it is entered into, the city has reached or exceeded its "debt limit," and that the full amount of the city's obligation under such contract remaining unpaid is an "existing indebtedness" of the city and must be considered as such in determining the power of the city to become further indebted for other purposes.

Contract Liability a "Debt" within the Constitutional Limitation

Moreover, it is submitted that **irrespective of authority, the purpose of the constitutional debt limitation requires the above conclusions.** If binding contracts may be made by the city without reference to the "debt limit," how can the future taxpayer be protected from paying the contract price as it falls due? If the "debt limit" does not prohibit the incurring by the city of the contract obligation, neither it nor any other constitutional or legislative provision can be subsequently invoked **to impair the obligation of the contract.**

Above Conclusions Necessary to Effect Purpose of Debt Limitation

As pointed out in the case of Windsor vs. Des Moines, above, the contract binds the city as soon as it is made. When payments thereon become due the city must provide the means to make such payments, and if the contract was valid at the time it was made, payments earned under it by

the contractor must be paid irrespective of the debt limit. **Therefore, if the "debt limit" does not operate to prohibit the incurring of the obligation of the contract it can never apply to that obligation.**

It will readily be seen that if contracts binding upon the city are not indebtedness, within the meaning of the constitutional limitation of debt, the city officials may, without restriction or limit, bind the city to make payments which will increase its indebtedness beyond the debt limit. Indeed, under such a construction, the usefulness of the "debt limit" would be absolutely destroyed, and it might as as well be stricken from the Constitution.

Undoubtedly the "debt limit" must apply to contract obligations at some time. Either it applies at the time the contract is entered into, or at the time a payment thereon is earned and due. It is submitted that it would be impossible in practice to apply the limitation at the time the payment is earned. If a contract were entered into at a time when the city was well within its "debt limit," and subsequently, but prior to the maturity of a payment on the contract, the city issued bonds which carried it beyond its debt limit so that at the time the payment became due the city's power to incur indebtedness had been exhausted, the payment on the contract, if it be considered as a debt arising at the time the payment was due, would be void under the constitutional provision. If void, by reason of the constitutional provision, it cannot be ratified or validated in any way. Litchfield vs. Ballou, 114 U. S. 190 (1885)

Debt Limitation Applies to Contract when Made or not at all

This would mean that the validity of a contract depended, not upon the circumstances existing at the time the contract was made, but upon circumstances subsequently arising out of the act of one of the contracting parties. Any such attempt by the city to avoid a contract would be an impairment of its obligations, forbidden by the Constitution of the United States, and if it were possible to produce this result, it would be difficult to find bidders for city contracts.

Impairment of Obligation of Contract Forbidden by U. S. Constitution

The constitutional provision limiting the amount of municipal indebtedness is an expression by the people of the state of **a policy which shall control the administration of municipal finances, in order to prevent the assumption of**

Debt Limit a Policy of Administration

excessive obligations payable in the future. As such it should receive from the courts an interpretation calculated to give effect to this purpose.

Judge Dillon in his "Municipal Corporations" (Secs. 130-137) says:

> "Such limitations have been found by experience to be necessary to prevent extravagance * * * are based on the wise policy of paying as you go, and ought therefore to be construed and applied to secure the ends sought."

Therefore, irrespective of the ordinary meaning of the words "debt," "indebted" and "indebtedness," they should, in connection with the prohibition of this constitutional provision, be interpreted to prevent such an administration of the city's finances as would produce the very evil at which the provision is aimed.

Conclusion

It is, therefore, submitted that the full amount of the unpaid registered contract liability on June 30, 1908 (less that incurred on account of the supply of water) $54,005,206.07
plus the liability represented by contracts awarded and filed with the comptroller, but not registered 3,690,000.00

Total Debt Represented by Contracts

making a total of.....$57,695,206.07
constituted "existing indebtedness" of the city on that date.

And if it be decided that contracts for the high pressure water system are not contracts for the supply of water and therefore are not exempt, there should be added to the above the sum of $677,038.93

As pointed out above, each of the contracts included in the above total is registered, or will be registered against and payable out of a "bond fund" or "bond account" established in the comptroller's office by virtue of an "authorization" of the issue of city bonds to pay the cost of the particular improvements on account of which the contracts

Cash Balances in Bond Funds

were made.

The next question raised by the Record is whether cash balances in bond funds on June 30, 1908 may be treated as an offset to the contract liability on that date.

For this purpose these funds are divided by the Record into two classes:

Classification of Bond Funds

(1) Funds against which no contracts were registered on June 30, 1908

(2) Funds against which contracts were registered on June 30, 1908 (The contracts registered against these funds are those constituting the total registered contract liability, supra)

(1) Funds against which no contracts were registered

"Exhibit I" (pp. 252, 253, 254, 298, 299) shows cash balances to the credit of such funds as follows:

Cash in Funds against which No Contracts Were Registered

Corporate stock funds (other than water supply):	
Various municipal purposes	$4,339,442.51
Street and park openings	878,258.96
Assessment bond funds	70,898.56
Special revenue bond funds	399,280.55
Old Borough funds	48,257.76
Total	$5,736,138.34

From this total there should be deducted the sum of 3,010,120.59
which as appears by page 17 of Exhibit I is the cash proceeds of a sale of corporate stock to meet deficiencies in taxes for prior years.

In considering whether the balance, to wit $2,726,017.75 should be treated as an offset to outstanding contract liability, it should be borne in mind that money appropriated to a particular fund cannot be used for the purposes of another fund without formal transfer amounting to a new appropriation (City Charter Sec. 237). Therefore this cash, though in many instances in excess of the fund to the credit of which it is held, cannot properly be considered as an offset to outstanding contract liability to which, under the above Section of the Charter, it cannot be applied.

Not Applicable to Existing Contracts

It is submitted that this cash being transferable to the general fund and thereafter subject to appropriation by the Board of Estimate and Apportionment is of the kind referred to in Kronsbein vs. Rochester, 76 App. Div. 494 (supra p. 47) as capable of appropriation to any of several uses and therefore not to be treated as an offset to "existing indebtedness."

Therefore not To Be Deducted

2 Funds against which contract liability outstanding June 30, was registered

"Exhibit I" (pp. 252, 253, 254, 298, 299) shows cash balances to the credit of such funds as follows:

Cash in Funds against Which Existing Contracts Were Registered

Corporate stock funds (other than the water supply):	
Various municipal purposes	$2,161,994.66
Rapid transit	103,056.26
Assessment bond funds	599,139.03
Special revenue bond funds	28,210.52
Old Borough funds	4,471.45
Total	$2,896,871.92

This cash is to the credit of funds from which the total registered contract liability on June 30, 1908 was payable, and so far as the Record shows it was available for the liquidation of such contract liability.

If it was applicable **only to contracts then outstanding** it ought certainly to be deducted from the total liability under such contracts in determining the city's "existing indebtedness"; for it represents proceeds of bonds outstanding which are included in "Exhibit A" as part of the bonded debt of the city on June 30, 1908.

If Applicable to Existing Contracts Alone To Be Deducted

To the extent that the proceeds of such bonds are applicable to existing contract liability, the bonds should be treated as funding the contract liability and therefore merging it. Otherwise the same indebtedness would be computed twice, first, as bonded debt, and second, as contract liability.

If, however, this cash **might be used** to make payments on **contracts made subsequent to June 30, 1908** and **payable from the same funds,** it will readily be seen that it falls within that class of cash which not being necessarily applicable

If Applicable to Other Purposes not To Be Deducted

to the indebtedness existing at the time of the inquiry should not be deducted. Kronsbein vs. Rochester, supra.

The Record is silent on this critical point. It is submitted that the deduction of this cash depends absolutely upon the question whether it **can or cannot be used for any purpose other than the liquidation of contract liability outstanding on June 30, 1908.** If it can be so used, it ought not to be deducted. It is respectfully suggested that on this important point the Referee should require additional testimony as to the administration of these funds by the comptroller's office, and the exact status of these book balances of cash in the above funds.

Evidence on Record not Sufficient

Besides the cash in "bond funds" as above shown, the Record (p. 255) shows that on June 30, 1908 there was cash, the proceeds of bonds sold under "authorizations" then existing, which was available for "transfer" or "allottment" to the above funds, but which had not then been transferred to the credit of any particular fund. **This cash is commonly called "Unallotted Proceeds of Bonds Sold."** The reason for the existence of such an account is that the city, instead of selling its bonds under each particular authorization for the purpose and to the amount of that authorization, sells them in bulk in an amount sufficient to cover several authorizations, and as cash is needed for the purposes of a particular authorization, such cash is "transferred" or "allotted" to the fund representing that authorization.

Unallotted Cash Proceeds

These "unallotted proceeds" as shown by the Record were as follows:

Summary

	Principal	Premium	Total
Corporate stock for various municipal purposes (Record, p. 255)	$12,598,977.54	$524,086.27	$13,123,063.81
Corporate stock for rapid transit purposes (Record, p. 225)	1,599,000.00	68,855.29	1,667,855.29
	$14,197,977.54	$592,941.56	$14,790,919.10
Assessment bonds (Record, p. 225)	1,125,000.00	7,825.04	1,132,825.04
Corporate stock for the supply of water (Record, p. 225)	3,214,500.00	137,063.19	3,351,563.19
	$18,537,477.54	$737,829.79	$19,275,307.33
Deduct Unallotted proceeds of water supply bonds (Record, p. 225)	$3,214,500.00	$137,063.19	$3,351,563.19
(Record, p. 229)	$15,322,977.54	$600,766.60	$15,923,744.14
Special revenue bonds (Record, p. 294)	244,018.26	.....	244,018.26
	$15,566,995.80	$600,766.60	$16,167,762.40

The above total of .....$16,167,762.40 represents proceeds of bonds (other than revenue bonds and bonds for the supply of water) sold prior to June 30, 1908, in pursuance of "authorizations" then existing.

Whether it may be said that the whole of this sum was applicable to the purposes of those authorizations depends upon the question whether such authorizations, being made in a specified sum, carry with them the premiums on bonds sold to produce the sum authorized.

Premium on Bonds

Included in the above total is the sum of....$600,766.60 representing premiums on bonds sold.

The bonds from the sale of which the above cash was received were outstanding on June 30, 1908 and are included in "Exhibit A" as part of the city's bonded debt on that date. The cash was available for the liquidation of contract liability then existing, subject only to a transfer to particular funds.

Whether the cash ought to be treated as an offset to the existing contract liability depends upon the question whether it might be **used for purposes other than the liquidation of such contract liability. If the cash was subject to transfer to funds against which no contract liability was registered on June 30, 1908, or was capable of being used to make payments upon contracts made subsequent to June 30, 1908,** it will be seen readily that to this extent it ought not to be treated as an offset to the then existing contract liability.

Deduction Depends on Use to Which Unallotted Cash May Be Put

Cash in funds from which contract liability is payable and cash in unallotted proceeds accounts, and the bonds from which it was derived, can be treated as funding the contract liability, and therefore merging it into the bonded debt, **only to the extent that such cash is either necessarily or actually applied to the payment of contract liability actually outstanding at the time of the inquiry.** On this important point the Record is silent, and it is respectfully suggested that in order to enable the Referee to report, with the fullness required by the order of reference, all matters affecting the debts and liabilities of the city on June 30, 1908, additional testimony is absolutely necessary.

Rule Stated

Record Insufficient To Apply Rule

If it be shown that cash in the funds against which contracts were registered on June 30, and that in the "unallotted proceeds" account are applicable only to then existing contract liability, the total liability on account of contracts should be decreased by cash in funds as follows:

Summary of Cash in, or Applicable to, Bond Funds

Funds against which contracts were registered		$2,896,871.92
Unallotted proceeds of bonds other than water bonds		
(a) Principal	$15,566,995.80	
(b) Premium	600,766.60	16,167,762.40
		$19,064,634.32
Or, if premium, to wit,		600,766.60
be not included in the deduction		$18,463,867.72
Deducting these sums from the total contract liability on June 30, 1908 (*supra*, page 61)		$57,695,206.07
The net contract liability for other than water supply is either		
(1) If premiums be deducted as part of unallotted proceeds		$38,630,571.75
or		
(2) If premiums be not deducted		$39,231,338.35

If to the above total of contract liability there is added the contract liability of the high pressure system (See p. 54), and if it be held that cash balances in funds against which contracts were registered on June 30, 1908 should be deducted from the total contract liability in determining the "existing indebtedness," then in addition to the cash balances deducted above, there should also be deducted the sum of .....$52,582.66 cash balance in the high pressure funds.

3 LIABILITY TO MAKE "JUST COMPENSATION" FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE

Land Liability

The City of New York has the power to "take" private property for public use **without the consent of the owner**; but this power is subject to the following provisions of the State Constitution:

Constitutional Provision

Sec. 6: " * * * Nor shall private property be taken for public use **without just compensation.**"

Sec. 7: "When private property shall be taken for any public use the compensation to be made therefor * * * shall be ascertained by a jury or by not less than three commissioners appointed by a court of record as shall be prescribed by law."

The exercise by the city of its power to take private property is governed by the provision of Chap. 21 of the City Charter by proceedings in the Supreme Court, commonly called "condemnation proceedings." The title to the property is transferred to the city and the "just compensation" due the former owner is determined.

What Constitutes "Taking" of Private Property

It is the "taking" of the property that gives rise to the city's liability. The commencement of condemnation proceedings is not a taking of property. Webb Granite Co. vs. Worcester, 187 Mass. 385 (1905)

So long as the city has the power to withdraw from or discontinue the proceedings without paying to the owner the value of his property, the city has not become indebted for the value of the property, within the constitutional limitation of indebtedness. Windsor vs. Des Moines, 81 N. W. 476 (Iowa 1900)

If, however, condemnation proceedings are carried to a point where under the provisions of the law applicable thereto a private owner's title to real estate is divested and title vested in the city, the "taking" is complete, and the former owner has the right to insist upon payment by the city of the value of his land at the time of the taking.

Vesting of Title in City

A title to real estate acquired by the City of New York through condemnation proceedings vests in the city, either: (1) Upon confirmation by the Supreme Court of the report of commissioners of estimate and appraisal. The **amount of the city's liability to the former owner is contained in the report and is therefore fixed at the time the liability arises,** subject to future revision; (2) Upon the filing of the oath of the commissioners or upon a resolution by the board of estimate and apportionment fixing the date of vesting. In such cases the **amount of the city's liability is not fixed at the time the liability arises,** but is determined subsequently by the commissioners.

Determination of Amount of Liability

"Exhibit K"

Exhibit K in evidence purports to show the "estimated liability of the City of New York at July 1st, 1908 (A. M.), for lands acquired." It was testified that this Exhibit was a copy of a statement or report prepared in the comptroller's office in the usual course of business for the three months ending June 30, 1908; that the statement included

all lands, title to which had vested in the city prior to June 30 and for which payment had not been made by the city; that the amount of the city's liability for these lands, as shown in the Exhibit, was determined from the award contained in the commissioners' report, where title had vested upon confirmation of such reports, and from the assessment or other estimate of value where title had vested prior to the filing of a report by the commissioners. (Record, pp. 147-150).

The estimated liability of the city as of June 30, 1908 for lands previously acquired in condemnation proceedings, as shown by Exhibit K, was.....$21,754,382.25

"Supplemental" Evidence of Amount of Liability

At the time this Exhibit was put in evidence, counsel for plaintiff promised to "supplement" it in order to show what portion of the land liability was determined by confirmed reports in condemnation proceedings, and what part thereof was estimated liability for lands to which the city had taken title before the confirmation of the commissioners' reports (Record, p. 150).

This "supplemental" evidence is contained in Exhibit N, which shows land liability as follows:

"Exhibit N"

Reported confirmed	$3,031,507.40
Estimated (title vested prior to confirmation of report)	15,293,351.72
Total	$18,324,859.12

Contradicts "Exhibit K"

It will be seen at once that the "supplemental" exhibit contradicts to the extent of $3,429,523.13 the record prepared in the comptroller's office and introduced in evidence as Exhibit K. This supplemental exhibit was not proved, nor was it sworn to, nor was it stated even to be a record; and subsequent to its admission, the witness who had prepared Exhibit K confirmed the figures therein given as the estimated land liability of the city on June 30, 1908 (Record, p. 212).

"Exhibit K" Only Competent Evidence before Referee

It is therefore submitted that as the Record stands, the land liability must be taken as proved in the sum of .....$21,754,382.25 or, it must be concluded that there is no competent evidence on the Record showing the amount of the city's liability for land acquired in condemnation proceedings.

Errors and Omissons of "Exhibit K"

Testimony subsequently admitted (Record, p. 346), shows that one parcel of land included in Exhibit K under the title "Schools," namely, "Rutledge Street, S. W. of Lee Avenue $53,250.50" should not have been included as a liability on June 30, 1908 because the title thereto did not vest in the city until August 31, 1908.

It was also shown (Record, pp. 343, 344, 345 and 349) that several parcels of real estate, title to which vested in the city prior to June 30, 1908, were improperly omitted from Exhibit K, as follows: Perpetual easements for Brooklyn subway purposes; easements in Westchester Avenue, Fort George and Van Cortlandt Park extensions for subway; property on Front Street west of Garrison Street, Brooklyn. There is no evidence from which the amount of the liability in these cases can be determined.

Liability for Interest on Awards

The Record (pp. 336-349) shows the dates on which many but not all of the pieces of real estate included in Exhibit K vested in the city. The owner is entitled to interest on his award from the date of vesting. The Record does not furnish the necessary information for an accurate computation of interest accrued on June 30; but a computation based on the Record as it stands shows interest then due in the sum of approximately $2,000,000.00

Fees and Costs in Condemnation Proceedings

There is no evidence of the amount of fees and costs in the several proceedings included in Exhibit K. These fees and costs are not payable until taxed by the court under the provisions of Section 1447 of the Charter, which provides:

> "Such fees and expenses shall not be paid until they have been taxed at a special term of the supreme court in the judicial district as aforesaid, upon five days' notice to the corporation counsel of The City of New York. Upon such taxation due proof of the nature and extent of the services rendered and disbursements charged shall be furnished and no unnecessary costs or charges shall be allowed."

It is submitted that unless fees and costs had been actually taxed and allowed by the courts prior to June 30 and were then unpaid, they could not be considered as "existing indebtedness."

It is respectfully submitted that the city's liability for land taken in condemnation proceedings is an "indebtedness" within the constitutional debt limitation from the time of the vesting of title in city. At that time the former owner loses his land and acquires instead the right to have its value. **For the purpose of determining the amount** of the city's indebtedness on this account, it is submitted that in cases **where a report of commissioners has been filed, the amount of the award, plus interest to the date of inquiry,** should be taken; and in cases **where title has vested but no report** has been filed, **the assessed value, or other competent estimate of value,** at the time of vesting, **plus interest to the date of inquiry,** should be taken; and neither fees and costs subject to the court's taxation, nor interest to accrue, after the date of inquiry, should be considered.

Method of Determining City Land Liability

It is suggested that for an accurate estimate of the amount of the city's indebtedness on June 30, 1908 for land acquired, more information than that on the Record is needed. But on the basis of the Record as it stands, it is submitted that that indebtedness was as follows:

Land Liability Shown by Record

Estimated land liability (Exhibit K)	$21,754,382.25
Estimated interest accrued to June 30, 1908	2,000,000.00
Total	$23,754,382.25
Less "Schools—Rutledge Street" Improperly included in Ex. K	53,250.50
Total	$23,701,131.75

4 JUDGMENTS

All Judgments Debts

Judgments entered against the city are formal decrees by the courts that the city is indebted to the judgment plaintiff in the sum stated. Whether such judgments be recovered in actions ex contracto or ex delicto, they are, nevertheless, indebtedness of the city until paid. Stone vs. Chicago, 207 Ill. 492 (1904)

Considerations Affecting Computation of Judgment Debts

In considering the indebtedness of the city evidenced by such judgments, however, it should be ascertained what part thereof is payable out of appropriations duly provided, e. g. judgments for supplies or services furnished or rendered to

the city under contracts payable out of appropriations duly provided in the annual budget, since such contracts are not within the constitutional provision because provided for in the current revenues. Judgments recovered upon such contracts should be similarly treated, provided there remains a sufficient balance in the appropriations to pay the judgments. Moreover, it should be determined whether any outstanding, unpaid judgment has been provided for, or its obligation funded by the issue of special revenue bonds under Section 188, Clause 3 of the City Charter which provides:

Special Revenue Bonds To Pay Judgments

> "The comptroller is authorized to issue special revenue bonds to provide the means necessary to make payments for the following purposes. . . .3—such amounts as may be necessary to pay judgments recovered against the corporation."

The possibility of computing the same obligation twice, first as a judgment and second as a special revenue bond issued to provide funds to satisfy such judgment, is avoided by deducting from the city's liabilities the unallotted proceeds of special revenue bonds as suggested supra, page 63.

It is respectfully submitted that unpaid judgments are the "existing indebtedness" of the city. The Record shows such judgments as follows:

Unpaid Judgments Shown by Record

Borough of Manhattan (Record pp. 157, 203)	$29,563.98
Borough of Brooklyn (Record pp. 158, 200)	7,368.52
Borough of Richmond (Record pp. 158, 200)	594.55
Borough of Queens (Record pp. 158, 200)	158,902.03
	$196,429.08

The above figures, according to the testimony on pages 201 and 203 of the Record represent judgments filed against the city prior to June 30, 1908, "which have since been paid." These figures were taken from a record of "disbursements" (Record p. 157, Ex. 15 for identification).

It is submitted that to enable the Referee to report accurately and completely the liabilities of the city in

Insufficiency of Evidence of Unpaid Judgments

pursuance of the order of reference, a **statement of judgments against the city unpaid on June 30, 1908 is necessary.** The testimony now on the Record shows only such of these judgments as were paid prior to the taking of the above testimony. It does not show judgments as of June 30 which are still unpaid.

It is probable that counsel believed that the testimony now in the Record would be sufficient to raise the question whether unpaid judgments are within the indebtedness referred to by the constitution. This is true, but it is suggested that the additional information above referred to is necessary if the referee's report of the city's liabilities on June 30, 1908 is to be complete.

5 DISPUTED CLAIMS NOT REDUCED TO JUDGMENT

Summary of Claims

These claims as of June 30, 1908, as shown by the Record may be summarized as follows:

Nature of Claim	Testimony Record Page	Amount	Total
Claims in Tort			
Alleged damages for sewer overflow	309	$2,421,837.35	
Personal injuries	310	20,499,312.85	
Damages to real and person property other than sewer overflow	310	9,099,558.03	
Recovery of assessments	310	831,421.65	
Ejectment and eviction from premises	311	62,497.00	
Taxes paid in error	311	8,618.18	
			$32,923,245.06
Claims Arising Out of Contracts			
(a) **In general**			
Damages for alleged breach of contract	310	14,393,751.69	
Rents, etc.	310	29,610.57	
Extra work under contracts	310	185,647.38	
Damages for illegal occupation of real estate	310	759,890.00	
Deposited with the treasurer of Kings County	311	75,000.00	
Merchandise furnished	311	23,863.41	
Failure to award contract	311	25,000.00	
(b) **Salaries and Wages**			
Prevailing rate of wages	310	4,231,064.35	
Salaries	310	10,260,127.33	
Money due under Chapter 722 of the Charter	310	26,358.91	
Fourth Division: actions for alleged illegal suspension of employees	311	1,784,496.88	
			31,794,810.52
Forward			$64,718,055.58

Miscellaneous Claims			
Forward			$64,718,055.58
Infringement of rights	311	27,000.00	
Recovery on general improvement certificate of Long Island City issue of 1875-7	311	1,208.00	
Money for certificate given by the village of New Brighton for alleged value received	311	7,820.00	
To set aside settlement made by the public administrator	311	1,566.46	
Certificate issued by the Flushing Avenue Improvement Co. of Long Island City	311	11,500.00	49,094.46
	309	2,421,837.35	
TOTAL	311	62,345,312.69	
			$64,767,150.04

All of the above claims **are contingent not only as to the amount of liability,** but also as **to the fact of liability.** There is usually no accurate record of their amount, even estimated, prior to the recovery of a judgment. In a recent case in Illinois, where the courts construe the constitutional limitation of municipal debt strictly against the power to incur further debt, it is said that the obligation of contract is not within the constitutional provision when **the amount of the obligation** is incapable of ascertainment. E. Moline vs. Pope, 224 Ill. 386 (1906)

Liability for Claims Contingent

For these reasons Gray's "Limitations of Taxing Power" (p. 1073) says:

> "An unliquidated claim for damages in tort cannot fairly be considered as a part of the city's debt in calculating whether the constitutional limit has been reached."

As a practical objection to the inclusion of the contingent liabilities of such claims in the "existing indebtedness" of the city, the same author suggests that no one would purchase city bonds if they were subject to the possibility of being avoided by a subsequent judgment recovered upon an unknown and unliquidated claim existing prior to the sale of the bonds.

It is respectfully submitted that disputed and unliquidated claims, arising either ex contracto or ex delicto, are not within the meaning of the words "existing indebtedness" as used in the constitutional limitation of municipal debt. Prior to judgment it cannot be said that the city has become indebted in the amount of such claims, or in any

Claims not Debts

amount on account of them. As to the status of judgments recovered against the city and unpaid, see "Judgments" above.

If the Referee be of opinion that the claims arising out of contracts should be considered as existing indebtedness, it is suggested that additional testimony be taken to ascertain which, if any, of these claims would be paid, if established, out of appropriation accounts; and also which, if any, are included in the liabilities above considered under the heading "Contracts for Public Improvements." It is submitted that claims of the former sort are in the same position as any other liability payable from current revenues, and claims of the latter sort would be computed twice if considered a liability as a claim and also as part of the estimated cost of a contract.

6 MISCELLANEOUS OBLIGATIONS PAYABLE FROM BOND ACCOUNTS OR SECURED BY THE GENERAL CREDIT OF THE CITY

Under this heading are grouped the following obligations and liabilities of the City of New York:

(a) Open market orders
(b) Contracts for purchase of real estate at private sale
(c) Liability to reimburse funds diverted

(a) Open Market Orders

The City Charter, Section 419, permits city departments to order in the open market, that is, without public advertisement or letting of a contract, work or supplies, not exceeding in value the sum of one thousand dollars.

Orders Payable from Bond Accounts

"Exhibit N" shows that on June 30, 1908 there was outstanding unpaid orders of this class in the sum of $78,293.96 chargeable to and payable from bond accounts.

These Orders Represent Debts

These orders differ from contracts for public improvements chargeable to bond accounts only in the amount of the liability, and it is therefore submitted that they represented existing indebtedness of the city, within the meaning of the constitutional limitation.

It is respectfully suggested that the amount of liability represented by open market orders, as shown by "Exhibit N," is not necessarily accurate. The Exhibit shows only orders which on June 30, 1908 were filed in the various departments, but which had not at that time been forwarded to the comptroller's office for payment. It may be that there were at that time in the comptroller's office many more such orders remaining unpaid. If so, additional evidence should be received in order to place upon the Record the full liability of the city on account of open market orders chargeable to bond accounts.

Evidence of Amount of Orders Insufficient

(b) Contracts for the Purchase of Real Estate at Private Sale

In addition to the real estate acquired by the city for public use in condemnation proceedings, the city purchases real estate at private sale. Expenditures for this purpose have reached a total of six million dollars for one year. During the first six months of 1908, the board of estimate and apportionment authorized the acquisition by private purchase of real estate at an approximate cost of two million dollars. These figures are given in order to convey some idea of the possibility of outstanding liability on this account as of June 30, 1908.

Extent of City's Private Purchases of Real Estate

The Record contains no mention of the city's liability on account of contracts to purchase real estate. If such contracts were outstanding on that date, and under them title had not yet been closed, it is submitted that the contract price to be paid by the city for such real estate was undoubtedly an indebtedness, within the meaning of the constitutional limitation, and its amount should therefore be ascertained.

No Evidence thereof on Record

(c) Liability to Reimburse Funds Diverted

Authorization of Corporate Stock to Fund Uncollected Taxes

"Exhibit I" (p. 17) shows the following authorization for the issue of corporate stock of the city:

Title of Account	Bonds Authorized and Unissued	Cash Balance	Total
Corporate Stock Fund, to Provide for Deficiencies in Taxes of 1904 and prior, Deemed Uncollectible at January 1, 1905	$33,000,000.00	$3,010,120.59	$36,010,120.59

Of this authorization, three million dollars worth of bonds had been issued and were outstanding on June 30, 1908, and as such are included in "Exhibit A" as a part of the city's bonded debt. The additional sum of $10,120.59 represents the premium received from the purchasers of these bonds.

$3,000,000 of This Authorization Sold

It may be said as to the balance, to wit, $33,000,000.00, that on June 30, 1908 there existed nothing but an "authorization" for the issue of the bonds. If this were true, it would undoubtedly follow that there was no liability and no indebtedness on this account; but it is submitted that the information on the Record, taken in connection with public records, of which the Referee may take judicial notice, shows that this **is not an authorization of the usual kind, i. e. an authorization to incur liability or indebtedness in the future.**

Balance Unissued

The purpose of this authorization, to wit, "to provide for deficiencies in taxes for 1904 and prior" indicates that there existed **at the time the bond issue was authorized** a liability to the extent of the authorization and arising out of the insufficiency of the annual taxes for the years named, and that the authorization was required to enable the city, **not to enter into new obligations, but to pay off existing obligations.** If this is so, this "authorization" is in fact a **formal admission** by duly authorized officials **of an "existing indebtedness."**

This "Authorization" an Admission of Existing Indebtedness

Beyond the above quoted contents of "Exhibit I," the Record before the Referee is silent on this important matter. This may be due to the belief on the part of counsel that the information contained in "Exhibit I," as above quoted, was sufficient to raise the question involved; or it may be that further evidence upon this matter was not considered relevant to the purposes of the persons who are nominally the parties to the cases before the Referee.

Insufficiency of Evidence before Referee

In view, however, of the widespread public interest in this particular item of the city's obligations, it would be unfortunate if this case should terminate without the fullest possible evidence of the exact status of this matter. Fortunately, many of the facts necessary to an understanding of the obligation represented by this "authorization" are contained in records, which, it is submitted, should receive the judicial notice of the Referee.

Evidence in Other Public Records

The authorization itself shows that it was made in pursuance of Chap. 209, Laws of 1906, which is also Sec. 248 of the City Charter as amended:

> "The board of estimate and apportionment of the city of New York shall, on or before the first day of October, nineteen hundred and six, authorize corporate stock of the city of New York to be issued to an amount equal to so much of the deficiency, on the first day of January, nineteen hundred and five, in the product of taxes theretofore levied and deemed by the board to be uncollectible, as shall not have been provided for in prior tax levies or by the issue of corporate stock of the city of New York. Such corporate stock shall be authorized to be issued by the board of estimate and apportionment without the concurrence or approval of any other board or public body."

Authority to Fund Uncollected Taxes

In pursuance of this law, the comptroller, under date of September 13, 1906, transmitted to the board of estimate and apportionment a report prepared for him by the chief accountant and bookkeeper of the department of finance, setting forth the amount of uncollected taxes and deficiencies therein as of January 1, 1905, and recommended that bonds be authorized to the amount of $36,000,000 to provide for deficiencies in taxes of 1904 and prior years deemed uncollectible. The board of estimate and apportionment, under date of September 21, 1906 (p. 2171, minutes of the board of estimate and apportionment, 1906, financial matters), adopted the following resolution:

> " RESOLVED, that, pursuant to the provisions of Chapter 208 of the Laws of 1906, the board of estimate and apportionment hereby authorizes the comptroller to issue from time to time in the manner provided by Section 169 of the Revised Greater New York Charter, corporate stock of the City of New York to the amount of $36,000,000 to provide for the deficiency on the 1st day of January, 1905, in the product of taxes theretofore levied, deemed by the board of estimate and apportionment to be uncollectible and not provided for in prior tax levies or by the issue of corporate stock of the City of New York."

The Authorization of Corporate Stock

Pursuant to the above resolution, the comptroller sold bonds in the sum of $3,000,000. The balance of the authorization, viz, $33,000,000, remains unissued. This balance represents deficiencies in uncollected taxes of 1904 and prior years,

deemed by the board of estimate and apportionment to be uncollectible. It represents the amount paid out by the city on account of annual appropriations from sources other than the annual revenues. The annual revenues from which these payments should have been paid, or from which the sources of actual payment should have been reimbursed, have been declared to be uncollectible, and the necessity for reimbursing the funds actually used for these payments has been formally acknowledged in the authorization of the issue of corporate stock as shown above.

Amount Represented by These Uncollected Taxes Had Been Paid Paid Out by City

The fact that it has been possible to meet these annual appropriation payments from funds other than the proceeds of the annual revenues, is made possible by the general character of the cash account maintained by the city. Into this account is paid **all** cash received from annual taxes and other revenues, as well as the proceeds of bond sales. Out of this cash, all expenditures are made, **and made without reference to the amount of cash actually to the credit of the fund properly chargeable with the particular expenditure being made.**

Payments Made from City's General Cash Account

That cash, belonging to funds other than appropriation accounts for the years 1904 and prior, has been drawn upon to make up the deficiencies in taxes for those years, appears from the following figures taken from the comptroller's books as of June 30, 1908:

Outstanding Uncollected Taxes

Summary of Uncollected Taxes and Revenue Bonds Showing Amount of Cash Diverted from Other Funds to Appropriations

1898 and prior	$10,984,172.58	
1899	5,061,455.07	
1900	4,079,502.01	
1901	7,311,799.25	
1902	7,681,831.33	
1903	6,776,641.98	
1904	7,965,128.41	
1905	9,462,842.37	
1906	11,298,684.14	
1907	18,118,376.33	
		$88,740,433.47
Revenue bonds of 1907 and previous years issued in anticipation of the collection of these taxes outstanding June 30, 1908 (Exhibit A, p. 118)....		45,408,986.92
Outstanding taxes not covered by revenue bonds.....		43,331,446.55
ADD		
Revenue bonds of 1907 outstanding in excess of uncollected taxes of 1907.....		2,555,400.59
		$45,886,847.14
DEDUCT		
Unexpended balances in appropriation accounts of 1907 and prior years		8,801,069.98
Amount expended from funds other than proceeds of sale of revenue bonds or tax collections.....		$37,085,777.16

Without intending to suggest that the Referee is bound in any way by matters not appearing on the Record before him, but solely for the purpose of making clear the importance of this matter, attention is called to the testimony of the chief accountant and bookkeeper of the department of finance before the Joint Legislative Committee for Investigation of the Finances of New York City:

Evidence before Committee on Finances of City

"Q. Mr. Smith, this amount of $33,000,000 of unissued corporate stock authorized by the board of estimate to meet deficiencies in uncollected taxes has never been considered by you in estimating the city's indebtedness as a liability?

A. No sir, it has not.

Q. But it is a fact that it represents a sum which the board of estimate has recognized as a deficiency in the appropriation accounts of previous years?

A. It has.

Q. And a sum which has been obtained from other funds which must some day be reimbursed?

A. That is true.

Q. So that in fact there is the necessity of reimbursing the same funds to the extent of this $33,000,000 or thereabouts?

A. That is right.

Q. Has any effort been made to determine what funds they are which must be so reimbursed because of these expenditures?

A. There is an attempt being made now to find out.

* * * * * * * *

Q. If you feel permitted to express an opinion, Mr. Smith, what is your opinion as to whether or not this item ought to be considered as a liability of the city?

A. I consider it should be considered a debt."

(Record of Committee's Investigation, pp. 2437, 2438).

Liability to Reimburse Funds Diverted, a Debt

It is respectfully submitted that the necessity of reimbursing special funds from which cash was diverted to meet the deficiencies for which provision is made by the above authorization of corporate stock, constitutes an indebtedness of the city, within the constitutional provision.

In Allen vs. Davenport, 107 Iowa 90 (1898) it was held that all special funds diverted or misappropriated, and all unauthorized expenditures which must be reimbursed, are to be included in computing the city's "existing indebtedness," within the meaning of the constitutional debt limitation. To the same effect is the case of Rice vs. Milwaukee, 76 N. W. 341 (Wis.)

Additional Testimony Needed

With reference to this matter of the city's liability to reimburse funds diverted, it is respectfully suggested that additional testimony is required to enable the Referee to report accurately the nature and extent of the obligation.

Purpose of Suggestions of Additional Testimony

In making this and other suggestons herein that additional testimony be taken by the Referee for the purpose of obtaining more accurate figures, or more complete information, the judicial nature of the Referee's position is not being overlooked, nor is there any intention of criticising the Record as it stands. The sole purpose of these suggestions is to further an accurate and final determination of the issues involved in the cases before the Referee. These issues raise questions of vast public importance. Though nominally such questions arise between the parties of record, the decision to be rendered will in fact control not only the future administration of the city's finances, but also the attitude of investors toward future issues of the city's bonds.

Important Public Questions at Issue

If, through failure to include any possible liability of the city existing on June 30, 1908 the decision in these cases be that the city had on that date a certain margin of debt incurring or borrowing capacity, and if, relying upon that decision, additional bonds be hereafter sold by the city and purchased by the public, there may result not only hardship to individuals, but serious damage to the city's credit.

That the Court recognized the public nature of the issue involved in these cases, and the serious importance of an accurate decision thereon, is evidenced by the following provisions of the Order of Reference specifying the duties of the Referee in the Levy case:

The Order of Reference

> "ORDERED that Benjamin F. Tracy, Esq., be and he hereby is appointed Referee to take proof of all the matters involved in this motion and to report the same

> with his opinion to this Court with all convenient speed, and especially to take proof of and report with his opinion to this Court, the amount in which The City of New York was indebted for any purpose or in any manner on the 30th day of June, 1908, and to take any and all proof that may be offered showing **any obligation, indebtedness or liability of The City of New York in any form whatsoever which existed on said 30th day of June, 1908,** and to classify such indebtedness under proper headings **to the end that the Court may,** upon the coming of such report, **have before it all the evidence relating to the indebtedness of The City, and the various classifications thereof,** and **to be thus enabled to determine therefrom the amount of existing indebtedness coming under constitutional limitations."**

Compliance with Order of Reference Necessitates Additional Testimony

In conclusion, it is respectfully submitted that in order to comply with the above Order of Reference, and in pursuance thereof to report "the obligation, indebtedness or liability of the City of New York," in such manner that the Court may be "enabled to determine therefrom the amount of existing indebtedness coming under constitutional limitations," the Referee is in need of more complete and specific information than now appears on the Record before him with reference to many of the questions involved.

A brief summary of the questions, for the accurate determination of which it is suggested that additional testimony be taken, follows:

Summary of Suggestions as to Additional Testimony

1 Do all of the so-called water bonds represent debt incurred "for the supply of water," within the meaning of these words as used in the constitutional exemption of such debt, with particular reference to the debt incurred on account of the high pressure system? See page 25 supra.

2 What amount of the sinking fund holdings is pledged to the redemption of "exempt" debt?

(a) Holdings of sinking funds for redemption of city debt No. 1 for redemption of New York County bonds. Page 44 supra.

(b) Holdings of water sinking fund of the City of New York for redemption of "debt incurred" not "bonds issued" subsequent to Jan. 1, 1904 Page 44 supra.

3 What is the exact status of cash in funds against which contracts are registered and cash unallotted with particular reference to the question whether such cash is applicable to the liquidation of indebtedness not existing at the date of inquiry, i. e. to contracts subsequently made? Pages 62-66 supra.

4 An accurate list of real estate in course of condemnation, with dates of vesting of title, amount of award where a commissioner's report has been filed, the assessed value or other competent evidence of value where no report has been filed. No evidence appears on the Record as to the value of some of the real estate which the Record shows has been vested in the city. Pages 68-69 supra.

5 What was the total amount of unpaid judgments against the city on June 30, 1908? Page 71 supra.

6 What was the total amount of unpaid open market orders chargeable to bond accounts outstanding on June 30, 1908? Page 74 supra.

7 What, if anything, was the liability of the city on June 30, 1908 under contracts to purchase real estate at private sale? Page 75 supra.

8 What was the exact amount and the exact nature of the liability to fund which an authorization of $33,000,000 corporate stock (as shown by page 17, Ex. I) was outstanding on June 30, 1908? Page 75 supra.

Summary of "Existing Indebtedness"

Subject to the taking of such additional testimony, it is submitted that the "existing indebtedness" of the City of New York, within the meaning of the constitutional debt limitation as of June 30, 1908 may be classified and summarized as follows:

SUMMARY OF "EXISTING INDEBTEDNESS" WITHIN THE MEANING OF THE CONSTITUTIONAL LIMITATION, as of JUNE 30, 1908, IN ACCORDANCE WITH THE CONCLUSIONS OF THIS BRIEF, SHOWING THE MARGIN OF BORROWING CAPACITY ON THAT DATE

Page of brief					
	"EXISTING INDEBTEDNESS"				
20	**1 Bonds Outstanding** (Gross Bonded Indebtedness)				$905,260,115.77
	Deduct:				
22	County bonds			$21,808,279.64	
26	Water bonds issued subsequent to January 1, 1904	$38,937,318.26			
26	**Less** proceeds applied to debt incurred for the supply of water prior to January 1, 1904	8,261,308.55			
				30,676,009.71	
37	Revenue bonds issued in anticipation of taxes outstanding less than five years			119,174,986.92	
50	Sinking fund holdings	202,407,271.72			
	Less estimated amount held for the redemption of exempt bonds:				
	County $6,000,000.00				
	Water 134,004.81				
		6,134,004.81			
				196,273,266.91	
50	Available budget appropriations				
	For the redemption of bonds	3,710,825.47			
	For sinking fund installments	5,531,864.02			
				9,242,689.49	
	Total Deductions				377,175,232.67
	Net Bonded Indebtedness within the meaning of the Constitution				528,084,883.10
53	**2 Contracts for Public Improvements:**				
	Unpaid balance of estimated cost of registered contracts			76,713,689.43	
	Estimated cost of contracts awarded but not registered			3,690,000.00	
				80,403,689.43	
	Less estimated cost of registered contracts to provide for the supply of water			22,708,483.36	
				57,695,206.07	
	Deduct:				
63	Cash balances in funds against which contracts were registered (exclusive of water supply funds)	2,896,871.92			
65	Proceeds of bond sales, not allotted to specific funds (exclusive of proceeds of water bonds)	16,167,762.40			
				19,064,634.32	
	Net Contract Liability				38,630,571.75
66	**3 Liability for Lands Acquired**				23,701,131.75
70	**4 Judgments**				196,429.08
72	**5 Deficiencies in Taxes to be Funded**				33,000,000.00
	6 Open Market Orders				78,293.96
74	**TOTAL "EXISTING INDEBTEDNESS,"** Within the Meaning of the Constitution				$623,691,309.64
15	**Debt Limit,** i. e., 10% of the Assessed Value of Real Estate subject to taxation				624,048,060.20
	MARGIN OF DEBT INCURRING OR BORROWING CAPACITY—JUNE 30, 1908				$356,750.56

If it be decided that indebtedness incurred on account of the high pressure water system is not to be considered as a debt incurred on account of the "the supply of water," such indebtedness should be eliminated from the deduction made in the foregoing summary on account of debts incurred after Jan. 1, 1904 to provide for the supply of water. The amount of high pressure indebtedness included in this deduction is as follows:

Debts Incurred for High Pressure System

(a) Bonds issued subsequent to Jan. 1, 1904		$4,954,250.00
(b) Contracts made subsequent to Jan. 1 1904	$677,038.93	
Less cash in fund	52,582.66	
		624,456.27
Total high pressure debt		$5,578,706.27

If this sum be considered as "indebtedness," within the meaning of the debt limitation, the total indebtedness on June 30, 1908, is increased to the sum of....$629,270,015.91 which exceeds the debt limit on that date, to wit 624,048,060.20

in the amount of $5,221,955.71

If, however, the indebtedness incurred in the construction and establishment of the high pressure water system is included in the exemption of debt incurred for the supply of water, then the city had on June 30, 1908, a margin of borrowing capacity as shown by the above summary, to wit $356,750.56

If not Exempt Debt Limit Exceeded

All of which is respectfully submitted for the consideration of the Referee.

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Monday, October 5, 1908. No. 14.

Some additional interest was added to the New York City bond market by the turn, which the efforts of those who have in hand the determination of the city's actual borrowing power, have taken. The solution of the problem is being approached now by what appears to those familiar with the situation to be the proper methods. Too much emphasis cannot be laid upon the importance of the work which the Bureau of Municipal Research has done in assisting in the solution of this problem. Its report* issued during the latter part of the week is being given very careful consideration by all of the specialists in New York City bonds.

*Memorandum of Matters Relating to New York City's Debt that Suggest the Necessity either for Judicial Ruling or for Legislation, September, 1908

The Bureau of Municipal Research is indebted to the Comptroller and to the employees of the department of finance for uniform courtesy and assistance in gathering the statistical data contained in this brief

END OF
TITLE